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THE

NORTHERN IRELAND LAW REPORTS

CONTAINING

REPORTS OF CASES ARGUED AND DETERMINED

IN

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

NORTHERN IRELAND

EDITED BY
MARCUS D. BEGLEY,
ONE OF HIS MAJESTY'S COUNSEL.

1931.

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BELFAST:
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Lord Chief Justice:

THE RIGHT HON. WILLIAM MOORE.

Lords Justices of Appeal:

THE RIGHT HON. JAMES ANDREWS.
THE RIGHT HON. RICHARD BEST.

Chancery Division:

THE HON. DANIEL MARTIN WILSON.

King's Bench Division:

THE RIGHT HON. WILLIAM MOORE.
THE RIGHT HON. THOMAS WATTERS BROWN.

Judicial Commissioner Land Purchase Commission:

ROBERT D. MEGAW, K.C.

Attorney General:

THE RIGHT HON. ANTHONY BRUTUS BABINGTON, K.C.

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[These Reports will be cited as follows :—[1931] N.I.]

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CASES

DETERMINED BY

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

NORTHERN IRELAND.

SANDS v. GARDINER (1).

C.A.
1930.
April 30.

Landlord and Tenant—Recovery of Possession—Dwelling-house required by landlord for himself, being a person engaged on work necessary for proper working of an agricultural holding—Engaged—Meaning of—Rent and Mortgage Interest Restrictions Act (Northern Ireland), 1925 (15 & 16 *Geo.* 5, *c.* 12).

The plaintiff's father purchased a farm for the plaintiff who was registered as owner of the farm. The only dwelling-house and buildings on the farm were occupied by the defendant as a monthly tenant under the usual cottier tenancy agreement, and this tenancy was duly determined by notice to quit. The plaintiff, who was a person engaged on work necessary for the proper working of an agricultural holding, required the dwelling-house on the farm for his own occupation.

Held, by the Court of Appeal (Best, L.J., and Brown, J.), that clause (ii) of sub-section 1 of section 4 of the Rent and Mortgage Interest Restrictions Act (Northern Ireland), 1925, applied to the plaintiff as being a person engaged on work necessary for the proper working of an agricultural holding, that the plaintiff was entitled to succeed as coming within the provisions of this clause, and that it was not necessary to offer evidence of alternative accommodation.

---

(1) In the Court of Appeal before Best, L.J and Brown, J.

Case Stated by Moore, L.C.J., at Downpatrick Spring Assizes on appeal from a dismiss pronounced by the County Court Judge of Down as follows:—

This case came before me on an appeal from a dismiss without prejudice by the County Court Judge at Banbridge on the 15th day of October, 1929. The action was an ejectment on the title brought by the plaintiff to recover possession of a dwelling-house, garden and premises, situated in the parish of Seapatrick and county of Down. I refer to the civil bill.

E. S. Murphy, K.C., appeared for the plaintiff and Isaac Copeland, Counsel for the defendant. No evidence was called on behalf of the defendant, and I found the following facts:—

The plaintiff is the son of one Joseph Sands and the said Joseph Sands purchased a farm of land containing 10a. 0r. 15p. for his son the plaintiff, who was then about to be married, and the plaintiff was registered as owner on the 24th day of April, 1929. The said house and buildings were occupied by the defendant as a monthly tenant under the usual cottier tenancy agreement at the rent of 5/5d per month and the said tenancy was duly determined by notice to quit. The said house and buildings are the only buildings on said farm. The said farm of land had upon it the dwelling-house in question in this case and the said dwelling-house was the only house upon the said farm.

Since the plaintiff became registered owner of the said premises he has been married and has had to reside in a cottier house belonging to a neighbour which is upwards of 1,200 yards from the said farm, and the plaintiff has to keep all his horses at his father's place, which is about one mile from the house occupied by the defendant.

The said house in question in this action is required for occupation by the plaintiff who is a person occupied in work necessary for the proper working of an agricultural holding (i.e., the said farm).

E. S. Murphy, K.C., for plaintiff contended that clause (ii) of sub-section (1) of section 4 of the Rent and Mortgage Interest Restrictions Act (Northern Ireland), 1925, applied to plaintiff as being a person "engaged" on the work and that, the clause so applying, it was not necessary to offer evidence of alternative accommodation.

Copeland for defendant contended that the clause did not apply as the person "engaged" on the work was himself the owner and not somebody in his employment.

I was in favour of this view but was requested to state a case and so came to no decision.

The question for the opinion of the court is whether plaintiff is entitled to succeed as coming within the provisions of the said clause.

If the court holds that the clause applies and that plaintiff is not under the necessity of proving the existence of alternative accommodation, the dismiss of the County Court Judge will be reversed, and a decree granted for possession with £3 3s 9d costs in the County Court and £7 13s 9d costs of appeal.

If the court holds that the clause does not apply, and that plaintiff must prove the existence of alternative accommodation, the dismiss will be affirmed with £2 6s 6d costs in the County Court.

Murphy K.C. and *Hume* for the plaintiff :—

Clause (ii) of sub-section (1) of section 4 of the Rent and Mortgage Restrictions Act, 1925, applies to the plaintiff who is a person occupied in work necessary for the proper working of an agricultural holding. It is unnecessary for the plaintiff to show the existence of alternative accommodation. There is nothing in the Act to show that the landlord is excluded from the class of persons engaged on work of this kind. The policy of the Act is one that does not deprive the plaintiff of the use and occupation of his own farm. If the argument of the defendant were successful, it would follow that the only person who could not get possession is the owner.

Copeland for the defendant :—

The policy of the Act was one of restriction. The farm was bought after the restrictions had been imposed. In *Farmer* v. *McGrath* (1), a civil bill appeal tried at the

(1) Unreported.

Enniskillen Assizes, it was decided by Best, L.J., that an engagement means a contract. I submit that clause (ii) of sub-section (1) of section 4 of the Rent and Mortgage Interest Restrictions Act, 1925, does not apply as the person engaged on the work was himself the owner and not somebody in his employment. There is no reason why the meaning of "engaged" should be cut down. The word "engaged" refers only to a question of employment. The plaintiff was not obliged to buy the farm.

Murphy K.C. (in reply) :—

Sub-section (ii) of section 4 applies to all the conditions and circumstances in sub-section (e). Sub-section (ii) is intended to deal with every case arising out of the working of an agricultural holding. The word "person" is the most general term that could be used, and would clearly include the person who in the present case wants the dwelling-house.

BEST, L.J.

BEST, L.J.: This matter comes before us on a case stated by the Lord Chief Justice. (His Lordship then stated in detail the facts as set out in the case stated.) The case stated contains a general finding of fact that "the said house in question in this action is required for occupation by the plaintiff who is a person occupied in work necessary for the proper working of an agricultural holding (i.e., the said farm)." That is to say, to work the farm properly, the plaintiff must have the use of this dwelling-house. If plaintiff's case came within sub-section (e) of section 4, it would be necessary for him to prove the existence of alternative accommodation. Mr. Murphy contends that the case comes within the proviso (ii) which enacts that the existence of alternative accommodation shall not be a condition of an order or judgment on any of the grounds specified in paragraph (e) of this sub-section where the court is satisfied that the dwelling-house is required by the landlord for the occupation of a person engaged on work necessary for the proper working of an agricultural holding. If the plaintiff here is a person "engaged" on work necessary for the proper working of an agricultural holding, it is not incumbent

C.A. 1930.

SANDS v. GARDINER.

BEST, L.J.

on him to prove "the existence of alternative accommodation." As to the meaning of the word "engaged" there is great force in Mr. Murphy's argument that when the legislature wished to limit it, they did limit it as in paragraph (e) of the sub-section, and that when not so limited its meaning is wide enough to embrace the case of a person such as the plaintiff whose time is actually taken up with the task of working the agricultural holding though he is under no contractual obligation to do so.

I have accordingly come to the conclusion that clause (ii) of sub-section (1) of the Rent and Mortgage Interest Restrictions Act (Northern Ireland), 1925, applies to the plaintiff as being a person engaged on work necessary for the proper working of an agricultural holding.

The question in the case stated must be answered in the affirmative.

BROWN, J.

BROWN, J.: I agree with the judgment that Lord Justice Best has given, and for very much the same reasons. The clause which we are interpreting is really an appendix to paragraph (e). It is a special exception, a relief given in the case of agriculture, and is confined to agriculture. It does not apply to town tenancies. The governing clause seems to me to be that containing the words "for the occupation of a person engaged on work necessary for the proper working of an agricultural holding."

There is an enormous number of agricultural holdings where there is no such thing as hired labour. Are they to be excluded from the benefits contained in clause (ii)? If the contentions which have been urged on behalf of the defendant are to prevail, an enormous number of agricultural holdings would be excluded. To my mind, "engaged" as used here, possesses its usual meaning, occupied in doing work.

Solicitors for the plaintiff: *Wallace & Co.*
Solicitor for the defendant: *Thomas Elliott.*

J. McC.

C.A.
1930.

May 12.

POLLOCK v. LIVINGSTONE (1).

Motion for judgment—Whether included under "appeals"—Appeal to Court of Appeal or to Divisional Court—Government of Ireland Act, 1920 (10 & 11 *Geo.* 5, *c.* 67), *section* 41 (1)—*Effect of—Judicature Act* (*Ireland*), 1877, *section* 51—*Costs of argument before full Court, appeal having come before two members of the Court—Interpretation of Statute.*

During the argument in a motion for judgment before the Court of Appeal it was contended on behalf of the defendant (a) that such a motion is not of itself an "appeal"; (b) that a motion for judgment should be made to the Divisional Court and not to the Court of Appeal, as it has not been affected by the Government of Ireland Act, 1920, section 41 (1). The Court decided that as the question was of considerable importance it should be argued before a full Court.

Held, by the Court of Appeal (Moore, L.C.J., Best, L.J., Wilson, J., and Brown, J.), that the effect of the passing of the Government of Ireland Act, 1920, was to abolish "appeals," whether so called or not (including motions for judgment), to the Divisional Court, and to substitute for them appeals to the Court of Appeal.

An action for the balance of the price of goods sold and delivered by the plaintiff to Daniel Livingstone, deceased, late of Drumnakilly, County Tyrone, in his lifetime, was tried before Moore, L.C.J., without a jury, at the County of Tyrone Spring Assizes, on 21st March, 1930.

Daniel Livingstone died on the 16th May, 1922, and the defendants Henry D. Livingstone and Joseph G. Livingstone were sued as administrators of his estate. Only one of them, Henry Livingstone, defended the action.

The trial judge abstained from giving judgment, and left each of the parties to move for judgment as they might be advised. The plaintiff applied to the Court of Appeal for an order that judgment should be entered for him, and a similar application was made on behalf of the defendant, Henry D. Livingstone.

In the course of the argument before the Court of Appeal, it was contended on behalf of the defendant :—

---

(1) In the Court of Appeal before Moore, L.C.J., Best, L.J., Wilson, J., and Brown, J.

(a) that a motion for judgment is not of itself an appeal;
(b) that such motion should have been made to the Divisional Court and not to the Court of Appeal, as it has not been affected by the Government of Ireland Act, 1920, section 41 (1).

It was decided that the question being of considerable importance, it should be argued before a full Court, which was accordingly subsequently constituted.

M'Coy for the defendant:—

Prior to the passing of the Government of Ireland Act, 1920, a motion for judgment was always made to the King's Bench Division. It was attempted by means of that Act to bring the practice in Northern Ireland into line with English practice, but as motions for judgment were omitted from section 41, that attempt failed. The words used in section 41 only relate to some application under section 51 of the Supreme Court of Judicature Act (Ireland), 1877, which is by way of an "appeal." In the present case there can be nothing to appeal from, as no judgment had been pronounced. There can be nothing in the nature of an "appeal," until judgment has been entered.

An application to the Divisional Court to enter judgment would not have been an "appeal," it would have been an originating application for judgment. There must be in the first instance a completed record. The motion for judgment not having been mentioned in section 41, this is not an "appeal."

W. Johnson for the plaintiff:—

If the word "appeal" were being strictly used, it would not apply to section 51 of the Judicature Act (Ireland), 1877, at all. Some effect must be given to the word "appeal," it must be used in a wider sense as applying to all matters referred to in section 51. The words "or otherwise" in section 41 (1) of the Government of Ireland Act, 1920, are important. These words can only refer to all the matters contained in section 51 of the Judicature Act (Ireland), 1877, they are not confined to a motion for a new trial. The intention of the legislature was to bring the practice into line with the practice in England.

MOORE, L.C.J. : This case comes before us to be spoken to on minutes and it is desirable that the question should be settled before a full court as the point involved has been considered to be somewhat doubtful by some members of the legal profession.

The question is: What was meant by the word "appeal" in sub-section (1) of section 41 of the Government of Ireland Act, 1920?

I think the key to the true meaning of this sub-section is found in the closing words:

> "Provided that where . . . . an appeal under section fifty-one of the Supreme Court of Judicature Act (Ireland), 1877, would lie to a divisional court, whether by way of motion for a new trial or otherwise, an appeal shall lie to the Court of Appeal instead of to a divisional court."

In all these cases the appeal to the Divisional Court is abolished. The word "appeal" must be used in a wide sense as applying to all matters referred to in section 51 of the Judicature Act (Ireland), 1877. This section provides that "in proceedings in the Queen's Bench, Common Pleas, and Exchequer Divisions respectively, every motion for a new trial of any cause or matter on which a verdict has been found by a jury, or by a judge without a jury, and every motion in arrest of judgment, or to enter judgment *non obstante veredicto*, or to enter a verdict for plaintiff or defendant, or to enter a non suit, or to reduce damages, shall be heard before a Divisional Court; and no appeal shall lie from any judgment founded upon and applying any verdict unless a motion has been made or other proceeding taken before a Divisional Court to set aside or reverse such verdict or judgment, if any, founded thereon, in which case an appeal shall lie to the Court of Appeal from the decision of the Divisional Court upon such motion or other proceeding."

Mr. M'Coy has argued before us that a motion for judgment is not of itself an appeal because the trial judge has entered no judgment which can be appealed against.

I consider that in interpreting the Act I may have regard to its policy.

The former Divisional Court in Dublin was constituted out of a possible panel of seven Queen's Bench Judges (I exclude, of course, the trial judge). The Act of 1920 (so far as Northern Ireland is concerned) contemplates five judges in all. Again excluding the trial judge, this would leave two judges for the Divisional Court and two for the Court of Appeal. If one judge were ill there could be no appeal so long as the Divisional Court of two existed.

Mr. M'Coy has given us no reasons why the Divisional Court should be retained for this particular matter while abolished in other cases. I think it is plain that the policy of the Act was to abolish the Divisional Court in respect of all cases *in pari materia* with motions for a new trial. I think a motion for judgment is one of such cases.

It will be remembered that Lord Cave drew attention to the number of courts of review in Northern Ireland in his judgment in *Cooper* v. *General Accident Company* (1), but this was during a transition period, and since then two of them have ceased to exist.

It is well settled law that the court of construction is at liberty to discard the purely technical meaning of a particular word and to give it its general interpretation where more consistent with convenience. (See Lord Esher in *Barlow* v. *Ross* (2).

Taking advantage of this power, I think we should construe the word "appeal" in the sub-section merely as an equivalent to "application," which a motion for judgment clearly is.

For these reasons I consider that Mr. M'Coy's motion fails, and I so decide.

I think the costs of the present hearing, which is purely on a question of jurisdiction, should be dealt with by the two learned judges who have heard the previous arguments as they may be affected by the merits of the case of which really I know nothing.

---

(1) 1922 2 I.R 214.

(2) 24 Q.B.D. 381

BEST, L.J.

BEST, L.J.: I agree with the judgment of the Lord Chief Justice. This matter arose on Mr. M'Coy's argument before the Court of Appeal. We were of opinion when the matter was first raised by Mr. M'Coy that we had jurisdiction, but thought that the question ought to be debated before a full court.

Section 41 (1) of the Government of Ireland Act, 1920, provides that where an appeal under section 51 of the Supreme Court of Judicature Act (Ireland), 1877, would lie to a Divisional Court, whether by way of motion for new trial or otherwise, an appeal shall lie to the Court of Appeal . . . . instead of to a Divisional Court. To my mind, it is clear that in this section the word "appeal" is used in a general sort of way, as meaning the reference of a case from any court to a higher court. In all cases where, prior to the passing of the Government of Ireland Act, 1920, an appeal, whether so called or not, under section 51 of the Supreme Court of Judicature (Ireland) Act, 1877, lay to the Divisional Court, it now lies to the Court of Appeal.

WILSON, J.

WILSON, J.: I agree with the judgments which have been delivered in this case. Under section 51 of the Supreme Court of Judicature Act (Ireland), 1877, every motion for a new trial, and every motion in arrest of judgment, or to enter judgment *non obstante veredicto*, or to enter a verdict for plaintiff or defendant, or to enter a non suit, or to reduce damages, was heard before a Divisional Court. Every one of these motions was an appeal because it was an application from the decision of the court which heard the case to the Divisional Court which had jurisdiction to uphold, vary, or revise the decision of the court which heard the case. It was no less an appeal because an appeal, by express words, was given by the same section to the Court of Appeal from the decision of the Divisional Court on such motion. By section 41 (1) of the Government of Ireland Act, 1920 (10 & 11 Geo. V, c. 67), it was provided that where an appeal under section 51 of the above Act of 1877 would, but for this provision, lie to a Divisional Court, an appeal shall lie to the Court of Appeal instead of to a Divisional Court. Here the word "appeal" is applied by the legislature itself to describe the motions mentioned in section 51 of the Act of 1877. What was intended, and what was provided, was that where, prior to the passing of the Government of Ireland Act, 1920, an appeal, whether so called or not lay to the Divisional Court, it now lies to the Court of Appeal. I think the point is too clear for argument.

BROWN, J.

BROWN, J.: I agree with the judgments which have already been given. The word "appeal" must be interpreted in a reasonable way. It seemed to me that Mr. Johnson's argument on the point was irresistible. The greatest help has been given to the Court by the Counsel on both sides.

Solicitor for the plaintiff: *W. Edmund Orr.*
Solicitors for the defendant: *Dickie & Carson.*

J. McC.

Note.—Andrews, L.J., was absent through ill-health, and Moore, L.C.J. (though the Trial Judge), sat with the express consent of the parties, as the appeal on this point was solely concerned with jurisdiction. (Ed.)

K.B.D.
(Probate)
1930.

IN THE GOODS OF DRUMM (1).

June 6.

Will—Reference to executors but no executors appointed—Executors according to the tenor.

A testator bequeathed two farms of land to F. O. and T. J. in trust for his wife and family; he directed that the farms should be sold and that the proceeds should be divided by his executors. The will contained no appointment of executors.

Held, that F. O. and T. J. were entitled to probate as executors according to the tenor.

MOTION *ex parte* on behalf of Francis O'Neill and Thomas Johnston, the trustees of the will of Thomas Drumm for a grant of probate of the testator's will, as executors according to the tenor.

The material parts of the will were as follows :—

"I hereby direct all my just debts and testamentary expenses to be paid. I bequeath my two farms of land in the townland of Annaghmore to Francis O'Neill of Irish Street, Dungannon, and Thomas Johnston of Annaghmore in trust for my wife and family, my said farms to be sold as soon after my demise as possible. If they make a profitable price this to be divided by my executors and their decision is to be final. The proceeds of the sale is to be divided in the following shares . . . ."

The will specified the shares into which the proceeds of the sale were to be divided and concluded with a gift to the testator's wife.

Nicholson for the applicants :—

If a will contains a direction or power which involves general administration or any office or duty peculiar to an executor, executorship according to the tenor follows. *In the Goods of John M'Kane* (2). In the present case not only does the will impose a duty which could only be carried out by executors but the testator refers to "his executors." This being so the trustees should be deemed executors according to the tenor.

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(1) In the King's Bench Division (Probate) before Moore, L.C.J
(2) 21 L.R Ir 1 at p. 7

MOORE,
L.C.J.

[He also referred to *In the Goods of Baylis* (1) and *In the Goods of William Bradley* (2).]

MOORE, L.C.J.: I have read the will and am satisfied that the application is a proper one. I deem the trustees executors according to the tenor and order that probate of the will be granted to them.

Solicitor for the applicants: *Joseph H. Donnelly.*

J. D. C.

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(1) L.R. 1 P. & D. 21. (2) 8 P.D. 215.

Jud.Commr.
1930.

Feb. 4, 21.

MONTGOMERY'S ESTATES (1).

(N.I. 467 and 670.)

Land Purchase—Sporting rights not in possession or enjoyment of vendor on appointed day—Vesting of such rights—Irish Land Act, 1903 (3 *Ed.* 7, *c.* 37), *ss.* 13 & 99—*Northern Ireland Land Act*, 1925 (15 & 16 *Geo.* 5, *c.* 34), *ss.* 8 & 15.

The estates of M. were estates to which the Northern Ireland Land Act, 1925, applied. The sporting rights on several townlands forming part of the estates had been let by the owner, and these lettings were in existence on the appointed day. Agreements were entered into between the owner and some of the purchasing tenants, purporting to be pursuant to section 13 of the Irish Land Act, 1903, whereby the tenants consented to the sporting rights on their respective holdings being reserved to the owner. The owner served notices pursuant to section 15 of the Northern Ireland Land Act, 1925, requesting that the rights of fishing and taking fish on the holdings in question should be reserved to him. It was claimed on his behalf that the sporting rights, being let, were not in the possession or enjoyment of the owner on the appointed day and accordingly vested in him, and not in the Land Purchase Commission, on the expiration of the leases.

Held, that the notices relating to fishing rights served by the owner operated to reserve such rights to him.

And *Held*, that the agreements entered into with the tenants did not operate to reserve all sporting rights to the owner without the assent of the Land Purchase Commission.

And *Held*, that the sporting rights which were let at the appointed day were not in the possession or enjoyment of the owner and that by virtue of the provisions of section 99 of the Irish Land Act, 1903, such sporting rights did not vest in the Land Purchase Commission.

MEMORANDUM and Questions of Law referred for the decision of the Judicial Commissioner.

MEMORANDUM.

The holdings comprised in the townlands of Old Barr, Knock Beg, Tullynasrahan and Stranacally were included in Final List No. 833. The 15th September, 1928, was fixed as the appointed day in respect of the lands in that list, and on that date the holdings vested in the Land Purchase Commission, Northern Ireland.

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(1) In the Court of the Land Purchase Commission before Megaw, K.C., Judical Commissioner.

According to information furnished by the solicitors for the vendor, the sporting rights on the said four townlands were let to Mr. Oliver A. Pringle for five seasons from January, 1924, and the letting terminated on 31st December, 1928, and was therefore in existence on the appointed day.

The holdings comprised in the townland of Mullynavale were included in Final List No. 816. The 15th September, 1928, was fixed as the appointed day in this case also, and on that date the holdings vested in the Commission.

The sporting rights on the townland of Mullynavale are the subject of a lease dated 1st July, 1910 (now vested in Lieut.-General Sir A. A. Montgomery-Massingberd), for the term of twenty-one years from the 1st day of May, 1910.

All the lands were held in fee simple and the vendor, at the date of sale, was absolute owner.

Notices were served, affecting all the lands, purporting to be pursuant to the provisions of section 15 of the Northern Ireland Land Act, 1925, and an agreement was entered into between the vendor and some of the purchasing tenants purporting to be pursuant to the provisions of section 13 of the Irish Land Act, 1903. The Land Purchase Commission is not a party to the said agreement nor has any assent been given by the Commission thereto.

The solicitors for the vendor now claim that the sporting rights over the four townlands first mentioned reverted to him on 31st December, 1928, when the letting to the late Mr. Pringle expired, and that the sporting rights over the townland of Mullynavale will revert to vendor on 30th April, 1931, when the lease of 1st July, 1910, will expire.

QUESTIONS OF LAW.

1. Do the notices above referred to operate to reserve the right of fishing and taking fish to the vendor?
2. Does the agreement above referred to operate to reserve to the vendor all sporting rights over the

holdings referred to in said agreement without the assent of the Land Purchase Commission?

3. If not, (a) on the assent of the Land Purchase Commission being given does the said agreement operate to reserve to the vendor all the sporting rights over the holdings referred to in the agreement? or (b) can the Land Purchase Commission by agreement under section 13 of the Act of 1903 cause the said rights to be reserved to the vendor?
4. Having regard to the letting to Mr. Oliver A. Pringle, are the sporting rights over the lands comprised in Final List No. 833 now vested in the Land Purchase Commission, or in the vendor?
5. Having regard to the lease dated 1st July, 1910, (a) are the sporting rights over the lands comprised in Final List No. 816 now vested in the Land Purchase Commission? or (b) is the reversion in the said sporting rights expectant on the termination of the said lease of said rights dated 1st July, 1910, now vested in the Land Purchase Commission or in the vendor?

Davison K.C. and *MacDermott* for the Land Purchase Commission:—

The method of transfer of land under the Northern Ireland Land Act, 1925, differs from the system which prevailed under the earlier Land Acts. The agreement deemed by section 8 to be entered into is an agreement between the vendor and the Land Commission. Accordingly the agreement between the vendor and purchaser, referred to in section 13 of the Irish Land Act, 1903, must now be construed to mean, not an agreement between the vendor and the purchasing tenant, but an agreement between the vendor and the Commission.

The expression "Land Purchase Acts" is defined by section 98 of the Irish Land Act, 1903, as including only part I of that Act. Section 99 of the same Act, which provides that sporting rights, not in the possession or enjoyment of the vendor at the time of sale, shall not be affected, is not included in part I and consequently does not form part of the Land Purchase Code and has no application to the present case.

[THE JUDICIAL COMMISSIONER: Section 99 is expressly referred to in section 16 of the Act of 1925.]

If section 99 does apply, then it must be given a much wider construction than that sought to be placed upon it. The words "possession and enjoyment," which appear in this section, do not necessarily imply actual physical possession. The owner may be in possession or enjoyment through his tenant. If it had been intended to confine the operation of section 99 to physical possession the expression "actual physical possession" would have been used.

[They referred to *In re Talbot Crosbie's Estate* (1), *The Queen* v. *Wall* (2) and *Estate of Joseph Stephens* (3).]

Murphy K.C., *Monroe K.C.* and *Dougherty* for the vendor:—

The present case is governed by the provisions of section 99 of the Irish Land Act, 1903. The fact that this section is not specifically referred to in section 15 of the Act of 1925 cannot render it inoperative.

Possession is defined in Stroud's Judicial Dictionary, vol. 2, page 1513, as meaning the present right to property or to the enjoyment thereof as distinguished from reversion, remainder or expectancy. In *Edinburgh Life Assurance Company's Estate* (4) it was held that mines and minerals which were being developed by lessees of the vendors were excluded from the sale under the provisions of section 99 of the Irish Land Act, 1903.

The purchase money which the owner receives is calculated without regard to the sporting rights. It would be contrary to the policy of the Land Purchase Acts to deprive the owner of such rights without compensation.

Cur. adv. vult.

THE JUDICIAL COMMISSIONER: This case comes before me by way of Memorandum referring certain questions of law regarding sporting rights for my decision.

(1) [1905] 1 I.R. 570
(2) [1898] 2 I.R. 769
(3) 39 I.L.T.R. 107
(4) 41 I.L.T.R. 60

Feby. 21.

[The Judicial Commissioner here read the Memorandum.]

The agreement referred to in the Memorandum purported to operate by reserving any rights to game over the vendor's lands to the vendor.

Before reviewing the legislation affecting the questions for decision I should like to mention two matters that must always be borne in mind.

(1) In interpreting an Act which deals with the compulsory transfer of property corporeal or incorporeal a court should be slow to assume that the Legislature intended that rights of property should be transferred without compensation and

(2) In interpreting the code of Land Purchase Acts a court cannot leave out of sight the progressive system by which the Legislature has taken steps that, in the transfer of ownership from landlord to tenant, the title of the new owner shall be freed of all possible restrictions and burdens.

A court however has got to deal with the actual legislation and the observance of the principles I have mentioned which often come into conflict can only have effective influence in cases where the language of the legislature is ambiguous.

In *Bayley* v. *The Marquis Conyngham* (1) the nature, creation and incidents of a sporting letting came under review and it was held that by the application of Deasy's Act a letting could be made of such rights in the same way as a letting of the lands over which they existed.

In the Rating Act, 1874, section 6, sporting rights are constituted a subject of rating and for the purposes of the Rating Acts the owner of such rights is deemed to be the "occupier" and may be rated as occupier and the person entitled to receive the rent is deemed to be the "owner" of the right. It would appear that under section 12 of the Valuation (Ireland) Act, 1852, sporting rights are rateable. It follows, I think, that possession is given to the lessee of these rights and he has a right of enjoyment practically on the same footing as a tenant has in regard to demised lands. The lessee is not a mere licensee and he holds in a different way from one who has a conacre letting.

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(1) 15 I.C.L.R. 406

The wording of section 99 of the Irish Land Act, 1903, interpreted literally, would, I think, give to the lessee of sporting rights the possession and enjoyment of sporting rights during the term of the letting and this opinion is strengthened by the considerations I have mentioned, viz., that the lessee's interest has been held in *Bayley* v. *Marquis of Conyngham* (1) to be of the same character as an interest in corporeal hereditaments and that it is rateable.

It has been argued, however, that section 99 even if it forms part of the Land Purchase Acts has been abrogated in respect of sporting rights by section 15 of the Northern Ireland Land Act, 1925.

Before the Land Law (Ireland) Act, 1881, questions relating to game rights between landlord and tenant depended on express contract. In that Act is was recognised that generally the landlord had reserved rights of game and accordingly it was provided that during a statutory term the landlord, if he so desired, and his licensees might enter upon the tenant's holding for the purpose of hunting, shooting, fishing, or taking game or fish as though the right of doing so were reserved by the landlord to himself by deed.

It will be found that in the great majority of cases where statutory terms have been created the landlord exercised this right of entry for the exercise of rights to game and fish. At this stage and down to the Act of 1903 the phrase "sporting rights" does not appear in the Land Code.

Prior to the Act of 1903 no question arose in the administration of the land purchase provisions of the Land Acts, as the destination of sporting rights, if they were the property of the landlord vendor, always depended on the terms of the agreement for sale, and if they were not the property of the landlord the sale could not affect them, unless so far as they were affected by the law as to the redemption of "superior interests." The Act of 1903, however, called for some express legislation, and we find in it the expression "sporting rights" for the first time, and ex-

(1) 15 I.C.L.R. 406.

press provision for the method in which sporting rights are to be dealt with in section 13. Sporting rights are defined by section 13, sub-s. 2, as including " any right of hunting, shooting, fishing, and taking game or fish on any land." Sub-s. 1 of the same section provides that where at the time of sale of any land either to the Land Commission or direct to the tenants the vendor has sporting rights exclusive of the tenant, these rights may, by agreement between the vendor and purchaser be either conveyed to the purchaser or expressly reserved to the vendor —(recognising the existing practice)—or in the absence of such agreement it is enacted that the rights shall be vested in the Land Commission and that the Land Commission should deal with them by statutory regulations. The other sections in the Irish Land Act, 1903, affecting sporting rights are section 16, sub-s. 1 (b), and section 99 (a).

This is the first time that there is any power in the Land Commission to deal with sporting rights, apart from being a conduit pipe, to carry out an agreement between landlord and tenant. It is satisfactory that I am not called on to interpret the position created under the Act of 1903 without authority. Questions similar to the present were put to Meredith, J., as Judicial Commissioner, in *Macnaghten's Estate* (1), the first question being whether an exclusive right of fishing and sporting rights reserved to the Irish Society could be compulsorily redeemed.

The learned judge after a careful review of the sections of the Land Purchase Acts then in force came to a clear decision that they could not be compulsorily redeemed. Among other reasons for this conclusion Meredith, J., pointed out that the rights could not be redeemed " on the ground that the order for redemption would be useless, as, unless by consent, the claims with regard to them could not attach to the purchase money." That is a consideration that, as I indicated at the outset of my judgment, is of great moment in the present case, seeing that from the very nature of the automatic method in which the purchase money is fixed no part of the purchase money is referable to "sporting rights." The decision in *Macnaghten's*

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(1) 38 I.L.T.R. 223

Estate (1) depended to a large extent on section 99 of the 1903 Act to which so great a part of the argument before me was directed. Mr. Davison strenuously urged the contention that section 99 did not form part of the "Land Purchase Acts." I need not say more in regard to this than to point out that if his argument were well founded decision after decision of the Land Commission Court and the Court of Appeal must have been given on a wrong conception of the law. Indeed *Macnaghten's Estate* (1) is decided expressly on that section.

The effect of sections 13 and 16 was also thoroughly probed and after considering in detail their operation in cases of direct sales to the tenants, and sales to the Land Commission, Meredith, J. held that sporting rights which had been reserved from the vendor's grant could not vest under section 16 in the Land Commission and that the measure of the tenants' rights in the sale by the Land Commission to the tenants could not be greater than the measure of the rights which the Commission acquired under the vesting order.

The effect of section 99 in the present case has to be considered in the case of demises for longer or shorter periods of sporting rights that were not excepted or reserved in the grants under which the owner held. During the argument I invited a discussion as to whether in cases of leases the lessor who received the rent or annual payment in respect of the rights was not in the possession or enjoyment of these rights at the time of sale. The analogy of a conacre letting where the person making the letting is considered as still in possession of the premises was examined, and it was contended that the lessor of an incorporeal hereditament through receiving the rents and profits of the letting was in enjoyment of the sporting rights during the term of the letting. I have already made some reference to this when I referred to the Rating Acts and the case of *Bayley* v. *Conyngham* (2). After giving full consideration to the arguments I have come to the conclusion that in this section 99 the expression "in the possession or enjoyment of the vendor" is not directed to the

(1) 38 I.L.T.R. 222 (2) 15 I.C.L.R. 406

receipt of the rent but to the actual rights of shooting and taking the game or fishing and taking the fish. I am strengthened in this conclusion by a case to which my attention has since been called by the Registrar of the Court —*Downing* v. *Low* (1).

This case was decided in regard to the operation of the 14th section of the Registry Act, 1706. That section provides that the Act shall not extend to leases not exceeding 21 years " where the actual possession goeth along with the said lease." Chatterton, V.C., held that an incorporeal hereditament of sporting rights fell under that section and that the tenant under an agreement for shooting was in actual possession under the agreement.

Hence it follows that at the time of the Act of 1903, unless the sporting rights were actually capable of being physically exercised by the vendor at the date of the agreement for sale neither section 13 nor section 16 had any application and this cannot depend on the longer or shorter term for which the letting was made.

It is now necessary to consider the effect of the Northern Ireland Land Act, 1925, on the pre-existing law. By section 8 it is enacted that " tenanted land in Northern Ireland shall on the appointed day by virtue of the Act vest in the Land Purchase Commission in the like manner and with the like consequences as if vesting orders had been made on the appointed day in respect thereof under section sixteen of the Act of 1903, in pursuance of new purchase agreements for the purchase of the same at the standard price entered into on the appointed day by the Commission with persons having power to sell under the Land Purchase Acts."

This in my opinion creates a notional agreement for sale between the owner as vendor and the Land Purchase Commission as purchaser immediately prior to the vesting. I cannot accept the argument put forward by Mr. Murphy that section 12 should be taken in conjunction with section 8 and that for the purpose of section 13 of the Act of 1903 the agreement should be considered as having been made by the owner with the purchasing tenant. The consent signed by the tenants in the present case was evidently based on this view of the law. It seems to me clear that so far as the owners are concerned the Land Purchase Commission alone is to be regarded as the purchaser.

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(1) 13 L.R. Ir. 553

Section 15 of the Act is not free from perplexing considerations. Read literally it would seem only to apply to land actually vested in the Commission, while the notice contemplated by the section refers to reservations that should be deemed to be made at the time of vesting. The rules are based on the view that the notice should be given after the date of the provisional list but before the appointed day. Perhaps nothing in the bewildering problems arising is more perplexing than the differentiation between the two classes of sporting rights that is made by section 15 and it is argued that since the service of a notice reserves fishing rights to the vendor, without any corresponding procedure being given in regard to other sporting rights it is intended that the provisions of section 13 of the 1903 Act applicable in case of there being no actual agreement should govern the future of sporting rights other than fishing. It is observed that section 99 comprised mineral rights as well as sporting rights and some stress was laid on the fact that the express application of that section as well as section 13 to mineral rights in section 16 of the Act of 1925 brought about an implied repeal of section 99 in the existing law so far as concerned sporting rights.

There is plausibility in this argument and I must give my opinion on it as it is vital in the present case. No agreement under section 13 of the 1903 Act has actually been made between the owner of the estate and the Commission consequently unless section 99 of the Act of 1903 applies the sporting rights have vested in the Commission. Though I am not free from doubt, I have formed the opinion that if it were intended to make such a radical change in the law, there would have been an express repeal of section 99 as affecting sporting rights. There has been no such express repeal and applying as well as I can the two principles mentioned at the outset of my judgment, *viz.*, that it is not lightly to be assumed that rights of property should be transferred by the legislature without any value being given or exacted, and that an unincumbered fee is as far as possible to be given to the new owner, I find that no payment for the rights of sporting comes into the purchase money, I also find that prior to the Act of 1925 sporting rights were not compulsorily redeemable, and unless by agreement the fee was vested in the tenant subject to rights of sporting, and referring to the Act of 1929 section 4, I see that in some cases of profits à prendre at any rate the existence of rights over the fee given to the new owner may still subsist, I have come to the conclusion that the question as regards the sporting rights having vested in the Commission either in possession or reversion on the publication of the final list must be answered in the negative.

I am by no means certain that a decision on the point becomes of serious practical importance. Seeing that section 13 of the Act of 1903 is expressly applied by section 15, sub-s. 2, of the Act of 1925 on the same principles as I enunciated in my answers to the questions put to me in *Beresford-Ash Estate* (1), the Land Purchase Commission would, no doubt, if the rights were valuable and their exercise was not likely to be oppressive to the purchasing tenants, agree to their being reserved to the vendor, especially in view of the fact that the purchase money has been arrived at regardless of these rights.

Indeed if I have rightly interpreted section 8 of the Act of 1925 that prior to the vesting of tenanted lands in the Land Purchase Commission there is a notional agreement between the owner and the Commission and we are by section 15, sub-s. 2, of the Act of 1925 referred back to section 13 of the 1903 Act. I think it follows that we must now in dealing with that section understand that the person having power to sell is the vendor and the Land Purchase Commission is the purchaser and that the appointed day is the time of sale. It was agreed in the argument by both parties that the Land Purchase Commission if it were held to be the purchaser under the notional contract could exercise all the rights given to a purchaser by section 13 and it is to be presumed that as their purchase would be a purchase in trust they would not by failing to agree in a proper case, secure that the rights would vest in themselves.

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(1) [1928] N.I. 200

In the light of what I have said the answers to the questions should be as follows :—

1. Yes.
2. No.
3. (a) No. (b) Not unless the vendor is in actual possession or enjoyment of the rights on the appointed day.
4. Not in the Land Purchase Commission.
5. (a) No. (b) Not in the Land Purchase Commission.

Solicitor for the Land Purchase Commission : *J. H. B. Gunning.*

Solicitors for the owner : *S. S. & E. Reeves & Sons.*

J. D. C.

K.B.D.
1930.

March 26.
April, 16.

OGLE v. MILLS (1).

[1930. No. 115.]

Practice—Costs—Setting off costs in separate actions—Equitable practice of Court.

O. had obtained interlocutory judgment against M. in an action for negligence in default of defence, and M. had obtained final judgment against O. on foot of a specially indorsed writ in an action on a money count. M. moved for, and obtained an order setting aside the interlocutory judgment and giving him leave to defend the action upon terms that he should pay O.'s costs incurred in entering and vacating the judgment and of the motion. M. then applied for an order that the costs payable by him to O. under the order setting aside the interlocutory judgment, should be set off against a corresponding amount of the debt and costs due to him (M.) by O. under the final judgment which it was considered impossible to realize.

Held, that the liability for the costs of setting aside the interlocutory judgment, having been incurred by virtue of a special bargain with the Court in return for a special privilege, were distinguishable from the ordinary liability for costs under the final judgment and should not therefore be allowed to be set off against this worthless debt.

MOTION by the defendant in an action brought to recover damages for negligence, that the costs payable by him to the plaintiff under an order setting aside an interlocutory judgment marked by the plaintiff in the action should be set off against a corresponding amount of the debt and costs payable to him by the plaintiff under a final judgment in an action on a money count.

The following statement of the facts is taken from the judgment of Moore, L.C.J. :—

On 8th January, 1930, William James Ogle issued a writ of summons in the King's Bench Division claiming damages against Hugh Mills for negligence.

On 22nd January Mills issued a writ of summons in the same division claiming against Ogle on a money count. This writ was specially indorsed.

On 12th February Ogle entered interlocutory judgment against Mills in default of defence in the former action.

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(1) In the King's Bench Division before Moore, L.C.J.

On 14th February Mills obtained final judgment against Ogle for £44 18s 0d with costs of the action and of the motion, making a total of £58 7s 3d.

On 28th February Mills obtained an order in the King's Bench Division setting aside the judgment obtained by Ogle on 12th February, and giving him (Mills) leave to defend on terms of paying Ogle the costs of entering and vacating the judgment and costs necessarily and properly incurred by him (Ogle) prior to the notice of motion with the costs of that motion when taxed and ascertained. Such costs were subsequently taxed and certified by the Taxing Master at £25 5s 4d. Mills deposed to the fact that there was no prospect of his being able to pay the amount due on foot of the final judgment.

Mills moved for an order giving him liberty to set off the sum of £25 5s 4d due by him to Ogle under the order of 28th February against a corresponding amount of the debt and costs (£58 7s 3d) due to Ogle by him under his judgment of 14th February.

Black K.C. and *Curran* for the defendant :—

Although there is no rule which enables costs in independent actions to be set off, the court has still a discretion under the former equitable practice, to permit a set off in such circumstances, notwithstanding the solicitor's lien for costs. *Reid* v. *Cupper* (1). The present case is one in which this discretion should be exercised.

[They also referred to *Puddephatt* v. *Leith* (*No.* 2) (2) and *Young* v. *Mead* (3).]

Williamson K.C. and *Reid* for the plaintiff :—

The question to be decided is, what is fair and just in the circumstances? In the present application the claim in respect of which the set off is sought had not arisen

(1) [1915] 2 K.B. 147
(2) [1916] 2 Ch. 168.
(3) [1917] 2 I.R. 258

when the plaintiff issued his writ, but arose subsequently. In view of this fact the discretion referred to should not be exercised in favour of the defendant.

[They referred to *Edwards* v. *Hope* (1) and *Knight* v. *Knight* (2).]

Cur. adv. vult.

April, 16.

MOORE, L.C.J.: [His Lordship stated the facts as set out above and proceeded]:—

The facts of this case are simple, and I have been greatly assisted by the arguments of Counsel on each side.

It is admitted that order 65, r. 18, does not apply to the present case inasmuch as the amounts payable to the parties are due under orders or judgments in separate actions. It is also admitted that I have a discretion under the former equitable practice of the Court to permit such a set off independently of the solicitors' lien if fair in the circumstances. This since the decision of the English Court of Appeal in *Reid* v. *Cupper* (3). While naturally paying every respect to the English authorities, I consider that in any event I would be bound to follow the decision of the late King's Bench Division in Ireland on this point, as laid down by Pim, J., in *Young* v. *Mead* (4), which however, is *in pari materia* with *Reid* v. *Cupper* (3) and *Puddephatt* v. *Leith* (No. 2) (5), the authorities already referred to. Mr. Justice Pim there held that this Court has a discretion to allow a set off and in that particular case that it ought to be allowed.

Mr. Justice Pim's judgment was a considered one, and I would infer that he was sitting as a Divisional Court.

Now so far as I can see at present, but I am not to be taken as being precluded from changing my views after argument hereafter, there will be nothing to prevent the Court from allowing Mills to set off against the debt due to him by Ogle any sum due by him to Ogle, should the latter subsequently recover damages with or without costs against him, always provided the Court considers it fair

(1) 14 Q.B.D. 922
(2) [1925] Ch. 835
(3) [1915] 2 K.B. 147
(4) [1917] 2 I.R. 258
(5) [1916] 2 Ch. 168

as between the parties, and *prima facie* it would appear to be fair, subject to any question of solicitor's lien.

In the present case, however, I must use my discretion, and that, as Pollock (now Lord Hanworth), M.R., observes in *Knight* v. *Knight* (1), must be " of course a judicial discretion." As his predecessor, Sir George Jessel, said in *Pringle* v. *Gloag* (2), " such a set off . . . . should not be refused if as between the parties themselves it would be fair and just to allow it."

I must therefore examine more closely the circumstances under which this sum of £25 5s 4d came to be payable.

It is true that I myself was the Judge who made the order, and I may therefore accidentally have more knowledge of the facts than if I had not so acted, but in my opinion I would have arrived at the same conclusion on consideration of the order of February 28th.

The order proceeds on the basis that the judgment was rightly marked—charges of malpractice or sharp practice against Ogle's solicitors were made at the bar, and were disproved; the judgment had been marked, it is true, very promptly but according to the full rigour of the game.

Therefore Mills came into Court to obtain a privilege, and according to established usage he could only obtain it on terms of indemnifying Ogle. Ogle's debt under the judgment Mills has obtained, on Mills' own statement, is worthless; it is for the present a paper debt. It may be a protection to Mills hereafter if the costs of the two actions ever come to be set off, but in my opinion it is not fair or equitable that Mills should have bought this privilege from the Court at the expense of the plaintiff by paying for it (since a set off is payment *pro tanto*) in debased coinage. I feel quite sure if the present application had been made to me, when the judgment was set aside, as it might have been made, I would not have left Ogle's solicitors, whose character was attacked without grounds, to be paid by Ogle, which means no payment—and I would then have refused it.

On the ground, therefore, that these costs are payable under a special bargain with the Court in return for a special privilege and are therefore distinguishable from the ordinary liability for costs under a final judgment in the action, I can not allow them to be set off against part of a worthless debt. This being so, no question of the solicitors' lien at present arises.

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(1) [1925] Ch. 835 (2) 10 Ch.D. 676.

If Mills desires to appeal against this exercise of my discretion on a question relating to costs, I will give him any leave which may be necessary.

I refuse the motion with costs. I have read the concluding paragraph of the judgment of Younger, J., in *Puddephatt* v. *Leith* (No. 2) (1), to which Mr. Black referred me, but as I am not allowing the set off asked for in the present motion, I think it better to order that so far as any further question of set off is concerned, they are to be treated as part of the general costs of the action in whatever manner they may subsequently be dealt with, as I am not now in a position to know whether or not a set off in respect of such general costs may ultimately be allowed.

Solicitor for the defendant : *William L. Skelton.*
Solicitors for the plaintiff : *John W. T. Watters & Son.*

J. D. C.

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(1) [1916] 2 Ch. 168

C.A.
1930.

March 4.

MURPHY & SONS v. BAIRD.

(1930. No. 213.)

Practice—Common Law action—Right to trial by jury—Jurisdiction to order trial by judge without jury—Supreme Court of Judicature (Ireland) Act, 1877, *s.* 48—*R.S.C.* 1905, *Order* 14, *rr.* 1, 6 & 8; *Order* 36, *rr.* 3 & 6—*Supreme Court of Judicature of Northern Ireland Act*, 1926, *s.* 2.

Moore, L.C.J., refused a motion for final judgment in the King's Bench Division upon a specially endorsed writ, and the consent of the defendant not having been obtained, ordered that the action be tried by a judge without a jury, and without the delivery of further pleadings.

Held, by the Court of Appeal (Andrews and Best, L.JJ.), that there was no jurisdiction to order the action to be tried without a jury when the defendant had not consented to such an order.

Appeal from an order of Moore, L.C.J., refusing the plaintiffs' motion for final judgment, and ordering that the action should be tried before a judge without a jury, and without the delivery of any further pleadings.

The plaintiffs sued the defendant on a specially endorsed writ for £86 18s 11d for the price of goods sold and delivered to the defendant. On 14th February, 1930, the plaintiffs applied to Moore, L.C.J., in the King's Bench Division for final judgment for the sum endorsed on the writ. It was contended before Moore, L.C.J., that as there were certain issues to be decided, both of fact and of law, the case did not come within Order 14, rule 1, and that judgment should not be entered for the plaintiffs. Moore, L.C.J., refused the plaintiffs' motion for final judgment, and ordered that the action should be tried before a judge without a jury and without the delivery of any further pleadings, and that the costs of the motion on both sides should be costs in the action.

The defendant appealed to the Court of Appeal on the ground that Moore, L.C.J., in making the order acted without and in excess of jurisdiction.

C.A.
1930.

MURPHY & SONS v. BAIRD.

Beattie K.C. and *Curran* for the appellant :—

The Lord Chief Justice should have refused the motion with costs. As there was a triable issue, no terms should have been imposed upon the defendant. We rely on *Jacobs* v. *Booth's Distillery Company* (1). Where the Court is satisfied that there is a triable issue, no such order should be made as was made in the present case. We also rely on *Runnacles* v. *Mesquita* (2). If the defendant requires a jury he is entitled to have one. In *Hogg & Robertson, Ltd.*, v. *Deegan* (3) it was held by the Court of Appeal of the Irish Free State, that section 48 of the Supreme Court of Judicature (Ireland) Act preserves the right of the defendant to have the facts tried by a jury, and that if Order 14, rule 1, prejudices that right it is *ultra vires*.

Final judgment motions are governed by a special procedure, and the rules applying to them have been very strictly construed. In *Magill* v. *Magill* (4), upon a motion in the King's Bench Division for final judgment upon a specially indorsed writ, the Court made no rule on the motion, and, notwithstanding the objection of the plaintiff, ordered that the action be tried by a judge without a jury, and without the delivery of further pleadings. The Court of Appeal held that there was no jurisdiction to order the action to be tried without a jury when the plaintiff refused to consent to such an order. We submit that if the Lord Chief Justice exercised his discretion in the present case, he exercised it wrongly.

Pringle K.C. and *M'Sparran* for the respondents :—

The whole question at issue is really one of account between the parties. The order made by the Lord Chief Justice was made in the exercise of his discretion. No interference should be made by the Court of Appeal with the order made by the Lord Chief Justice, which was discretionary.

We submit that having regard to section 2 of the Supreme Court of Judicature of Northern Ireland Act,

(1) 85 L.T. 262

(2) 1 Q.B.D. 416

(3) 57 I.L.T.R. 149

(4) [1914] 2 I.R. 533

1926, the Lord Chief Justice had full jurisdiction to make the order. We rely on *Golding* v. *The Wharton Saltworks Company* (1) and on *MacDonald* v. *Foster* (2). This is a matter which is left to the discretion of the judge. In *O'Shea* v. *Ryan* (3), where there was a motion for final judgment on a specially indorsed writ where leave had been given to defend, the Court refused the motion and exercising the power given to them by Order 14, rule 8, sent the action to the Judge of Assize, to be heard without pleadings. If all the affidavits are taken into consideration, the Court will come to the conclusion that the defence was for purposes of delay, there was no real defence in fact to the plaintiffs' claim. Leave to defend may be given conditionally.

Beattie K.C. (in reply) :—

The Supreme Court of Judicature of Northern Ireland Act, 1926, was not present to the minds of anyone during the hearing of the motion for final judgment. If reliance is to be placed now on section 2 of the Supreme Court of Judicature of Northern Ireland Act, 1926, there should have been an application referring specifically to that section. If there were questions to be tried, the method of proceeding by motion for final judgment should not have been adopted. These terms should not have been imposed on the defendant. The propositions put before the Court on behalf of the appellant have not been answered.

ANDREWS, L.J.

ANDREWS, L.J. : This case came before us by way of appeal from an order made on a motion for final judgment. The defence to the motion was that there were certain issues to be determined, both of fact and law, and that the case accordingly did not come within the provisions of Order 14, rule 1. I think the learned Lord Chief Justice must have held with the defence that there were such triable issues, for if he had not so held he would, in the ordinary course, have given judgment to the plain-

(1) 1 Q.B.D. 374 (2) 6 Ch.D. 193
(3) 37 I.L.T.R. 30

tiffs. The order which he made, however, refused the plaintiffs' motion and gave defendant liberty to defend, at the same time tacking on to that leave to defend, certain conditions, to which Mr. Beattie on behalf of the defendant takes exception.

Now, if I were satisfied that this was purely a technical point raised by Mr. Beattie, and that it was raised for the purpose really of affording time to an unmeritorious defendant, I think I would not give any effect to his argument; but he has put the case in a way that has satisfied me that that is not so; and he feels his client is suffering under a genuine disability by reason of these conditions. He accordingly asks for such relief as appears in the notice of appeal.

The main complaint which he makes is this, that he has by the order of the Lord Chief Justice been deprived of his statutory right to have the case tried by a jury under the provisions of the Judicature Act. Now, the Courts in many cases have considered the rights of parties to jury trial; and I think it is perfectly well settled that the Court has no right, in a case in which the statute confers a right to a jury, to deprive a party of that right.

The attitude of the Court on this question is well illustrated by the case of *Magill* v. *Magill* (1) cited by Mr. Beattie. That case came in the first instance on a motion for final judgment, before the King's Bench Division who made no rule on the motion and, notwithstanding the objection of the plaintiff, ordered that the action should be tried by a judge without a jury, and without the delivery of further pleadings. The Court of Appeal (consisting of O'Connor, M.R., Holmes and Cherry, L.JJ.) held that there was no jurisdicton to order the action to be tried without a jury when the plaintiff refused to consent to such an order. The only points of distinction between that case and the present case are: (a) it is alleged that in this case there are matters of account to be dealt with in a special way, and (b) that in the present case the defendant did not expressly dissent from the order that the action should be tried before a judge without a jury. In my view of the case if the defendant was entitled to have a jury at the trial, it is quite immaterial

(1) [1914] 2 I.R. 533

that he did not express his dissent. His express assent ought to have been obtained.

Now, I come to consider whether the defendant had an absolute right to a jury or whether there are any special circumstances in connection with this case which conferred a discretionary power on the Lord Chief Justice. For the purpose of establishing such discretionary power reliance has been placed on rules 6 and 8 of Order 14 under which the application for final judgment was made.

Take rule 8. (His Lordship then read the rule in question.) It is obvious that there is not included in that rule the power to deprive a party of his statutory right to have a trial by jury. The rule is absolutely silent as regards a jury trial, and the second part of the rule which was dwelt on by plaintiff's counsel deals only with the power of directing the action to be tried with or without any further pleadings in order in a proper case to expedite or reduce the cost of the hearing.

I come next to consider the terms of rule 6. (His Lordship then read the rule referred to.) It seems to me that this rule confers an absolute discretion upon the Court to impose conditions as regards security; but the Court is only empowered to impose terms in regard to the time and mode of trial "in cases which under these rules may be tried without a jury." What meaning is to be assigned to the words "may be tried without a jury"? I cannot find a case in which these words have been construed. I think they must be regarded as synonymous with the words that we find in rule 3, Order 36—"Causes or matters which the parties are not entitled as of right to have tried with a jury." Accordingly in such a case, where the parties have no absolute right to a jury, the Court may deal with the case as one in which it may direct not only the time of trial but also the mode, including (amongst other things) whether it is to be tried with or without a jury. I am satisfied, however, that it never was intended by that rule to take away the statutory right of a party under the Judicature Act.

The next point, accordingly, to be determined is whether this is a case in which the parties were not entitled to ask for a jury as of right? There are two reasons relied upon in support of that view by Mr. Pringle :—

(a) Section 2 of the Supreme Court of Judicature of Northern Ireland Act, 1926. In the first place I am of opinion that this section, if to be put in force, ought to be put in force by a motion *ad hoc*, and not to be relied upon merely in answer to a party who has brought a notice for another purpose before the Court. The complete answer, however, to the application of that section is that the power in rule 6 of Order 14 is limited to cases which "under these rules" may be tried without a jury. The right conferred by the Act of 1926 is not under the rules but under a subsequent statute.

As a further answer to the application of the statute to the present case I may say that in my opinion there are no sufficient facts on affidavit upon which we could come to the conclusion that the action is one which would require, within the words of the section, "any prolonged examination of documents or accounts."

(b) That this is an action for an account, or at any rate that it involves taking an account, and that it accordingly comes within rule 6 of Order 36, under which it should be tried without a jury. There are several answers to this contention. In the first instance, we are told by Mr. Beattie that this rule was never relied upon before the Lord Chief Justice; the substance of the rule is not referred to in the affidavits; there has been no attempt to say this is an action wholly of account; and further, on the facts that are before me I refuse to draw the inference which I have been asked do that the action was one which consists wholly or in part of matters of account, or, that it could not be conveniently tried in the ordinary way. My opinion is, that this case does not resolve itself into a really complicated matter of account. Questions will arise in regard to one or two payments. If the payments are held to have been appropriated to particular items, then the contention made on behalf of defendant that the other items of claim are statute barred may possibly succeed. On the other hand, if the plea that they were made generally prevail, the statute may go.

In my opinion Mr. Beattie has succeeded in presenting a case in which judgment should not be given against his client, and Mr. Pringle has failed to bring the case within any of the rules or exceptions on which he relies. Accordingly the conditions imposed by the learned Lord Chief Justice must be removed and we shall allow the appeal with costs here and in the Court below.

BEST, L.J.: I agree. (His Lordship read paragraph 3 of the second affidavit of the defendant David Baird.) In my opinion, the entire fight will range around the averments made in the third paragraph of that affidavit, and I cannot conceive a case which is more eminently suited for trial by a jury, or in which the defendant is entitled to have a trial by a jury, than this; and I accordingly agree with the judgment of my Lord.

Solicitor for the appellant: *W. L. Skelton.*
Solicitors for the respondent: *J. K. Currie & Son.*

J. McC.

C.A.
1930.

July 3.
Oct. 29.

IN THE MATTER OF

The Workmen's Compensation Act (Northern Ireland), 1927, and

IN THE MATTER OF

An arbitration between Henry Cole of Levallyreagh in the county of Down and division of Newry, labourer, a minor by Peter Cole, his father and next friend, applicant; and William Calvert of Rostrevor in said county and division, coal merchant, respondent; and Henry Harpur of Clonallon, Warrenpoint, in said county and division, third party (1).

Employer and Workman—Compensation—Principal and Contractor—Power of applicant to elect which to make liable for compensation—Accident arising out of and in the course of employment by a contractor in the execution of work undertaken by the principal—Workmen's Compensation Act (Northern Ireland), 1927, *s.* 6.

The appellant, W.C., carried on business as a coal merchant and importer of coal. In the transference of a cargo from a ship to the sheds, he employed H., a cartage contractor, to send two horses and two carts at the rate of 12s 6d per day for the hire of each horse and cart and man in charge. H.C., the applicant, who was in charge of one horse and cart, was hired by H. for 15s per week and food, and while engaged in "canting" the tub conveying the coal from the hold of the vessel to the cart, was injured.

The County Court Judge being of opinion that the applicant was at the time of the accident in the employment of the appellant, and that the accident arose out of and in the course of his employment, awarded him compensation and refused the application of the appellant for indemnity against the contractor, H.

Held, by the Court of Appeal (Moore, L.C.J., and Best, L.J.), that (a) there was evidence to support a finding by the County Court Judge that the accident arose out of the applicant's employment; (b) that the work on which the applicant was engaged at the moment of the accident was work in the course of the appellant's ordinary trade or business; (c) that the work of "canting" coal was part of the work undertaken by the appellant and he was liable to compensate the applicant;

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(1) In the Court of Appeal before Moore, L.C J. and Best, L.J.

Hockley v. *West London Timber and Joinery Company* [1914] 3 K.B. 1013, discussed.

Held also, that as the contractor H. would have been liable to pay compensation to the applicant, he must, under sub-section (2) of section 6 of the Workmen's Compensation Act (Northern Ireland), 1927, indemnify the appellant.

Appeal by the respondent, William Calvert, from the order of the County Court Judge of Down, dated the 28th October, 1929, awarding compensation to the applicant, Henry Cole, and refusing the application of the respondent, William Calvert, to be indemnified by Henry Harpur, who had been employed by him to do part of the work.

The appellant, William Calvert, carried on the business of a coal merchant and importer of coal, and had at his quay at Rostrevor, a cargo of coal for discharge from a ship and for conveyance to his shed in Warrenpoint. One of his own lorries was used in the transference of the cargo from the ship to the shed, and for the speedier despatch of the business Harpur, a cartage contractor, had agreed to send two horses and two carts to assist in the discharge. Calvert paid Harpur 12s 6d a day for the hire of each horse and cart and man in charge, Henry Cole, the applicant, being in charge of one horse and cart, and a man named Frank Markey being in charge of the other.

These men, Cole and Markey, were each hired by Harpur for 15s a week and food which was of the estimated value of another 15s a week. Their job was to cart coal from the ship.

The applicant, while engaged in "canting" the tubs of coal, met with an accident. He commenced proceedings under the Workmen's Compensation Act against William Calvert. A Third Party Notice had been served on Henry Harpur by William Calvert. On the 28th October, 1929, the County Court Judge made an order awarding the applicant £1 weekly, and refusing the application of the respondent to be indemnified by the contractor, Henry Harpur. He found that the injuries were caused to the applicant by an accident arising out of and in the course of his employment as a workman employed by William Calvert.

C.A.
1930.

Cole v. Calvert and Harpur

Murphy K.C. (with him *M'Sparran*) for the appellant, William Calvert :—

The employer of Henry Cole was Harpur, by whom he was paid and fed. Section 6 of the Workmen's Compensation Act (Northern Ireland), 1927, is declaratory of the law, and in so far as it makes new law, it makes it in favour of the appellant. Calvert had no control over the quay at Rostrevor, and did not undertake to execute any work on it. Work which is merely incidental to the work that is being performed is not within the section. *Skates* v. *Jones & Co.* (1), *Hockley* v. *West London Timber and Joinery Company* (2). We submit that the present case does not come within sub-section (1) of section 6 of the Act.

W. Johnson for the applicant, Henry Cole :—

There was no letting on hire or lending of a workman in this case, there being a contract between Calvert and Harpur. In his evidence before the County Court Judge Calvert stated :—"I had a contract with Harpur to cart the coal from the boat to the shed." The present case comes clearly within section 6. This was a contract to supply a man, a horse, and a cart. This was work that the principal has undertaken to execute. In Elliott's *Workmen's Compensation Acts* (ninth edition), it is stated "that the application of the section is not limited to a case where there are two contracts, namely, a head contract and a sub-contract, but extends to the case of a man who for the purposes of his trade or business undertakes work on his own account and employs a contractor to do the whole or part of the work, provided that the work is such as the person employing the contractor usually undertakes for another in the ordinary course of his trade or business, but not otherwise." *Dittmar* v. *Owners of Ship V 593* (3) has a strong analogy to the present case. The facts clearly distinguish the present case from *Hockley* v. *West London Timber and Joinery Company* (2). In *Hockley* v. *West London Timber and Joinery Company* (2) the business of the principals was the manufacture of mouldings of wood, in the present case the principal describes himself as a coal merchant and importer of coal.

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(1) [1910] 2 K.B. 903
(2) [1914] 3 K.B. 1013
(3) [1909] 1 K.B. 389
(4) [1914] 3 K.B. 1013

Warnock for Henry Harpur, the cartage contractor :—

In no circumstances can Harpur be liable. The accident did not arise out of Cole's employment. Cole's duty was to cart, he had no duty to "cant" the tubs, and I submit he cannot recover. It has not been proved that, independently of section 6, Harpur would be bound to compensate Cole, and no circumstances have been proved that would make him liable. I rely on *Plumb* v. *Cobden Flour Mills Company Limited* (1). I submit that it is absolutely clear and beyond all doubt that Cole cannot recover.

In *Herbert* v. *Samuel Fox & Co., Limited* (2) Lord Atkinson said in his speech at pp. 410-411 :—" I concur with the majority of the Court of Appeal in thinking that the present case is governed by the decisions of this House in *Barnes* v. *Nunnery Colliery Co.* (3) and *Plumb* v. *Cobden Flour Mills Company Limited* (1), properly understood. The principle laid down in them was, in my view, this, that where a workman meets with an accident while doing something actually outside the sphere of his employment, that accident does not arise, and cannot be held to arise, out of his employment, and that this is so whether he did that act from a desire for amusement, from feelings of fatigue, or to forward the object of his employer." In *Dennis* v. *A. J. White & Co.* (4), *Plumb* v. *Cobden Flour Mills Company Limited* (1), is referred to with approval. I also rely on *Lancashire and Yorkshire Railway* v. *Highley* (5). Cole was clearly acting outside the scope of his employment. I rely on the speech of Lord Birkenhead in *A. G. Moore & Co.* v. *Donnelly* (6) and especially on those portions of his speech to be found on pages 337-338. I submit that as *Plumb* v. *Cobden Flour Mills Company Limited* (1) was decided adversely to the workman, there is no ground for deciding the present case in his favour.

(1) [1914] A.C. 62
(2) [1916] 1 A.C. 405
(3) [1912] A.C. 44
(4) [1916] 2 K.B. 1
(5) [1917] A.C. 352
(6) [1921] 1 A.C. 329

I submit the learned County Court Judge was right in refusing Calvert's claim for an indemnity and that the appeal should be dismissed with costs.

Murphy K.C. (in reply) :—

The argument which has been advanced that the accident did not arise out of Cole's employment was not made before the County Cout Judge, nor is it based on evidence given before the County Court Judge. None of the cases quoted on behalf of the contractor remotely resemble the present case. *Dittmar* v. *Owners of Ship V* 593 (1) is clearly distinguishable from the present case. There is no distinction in principle between *Hockley* v. *West London Timber and Joinery Company* (2) and the present case. In *Hockley* v. *West London Timber and Joinery Company* (2) Lord Cozens-Hardy, M.R., said at page 1017 :—" Whatever else may be said about this section (that is, section 4 of the Workmen's Compensation Act, 1906, which is exactly the same as section 6 of the Workmen's Compensation Act (Northern Ireland), 1927), I feel that it is impossible seriously to suggest that everything which is reasonably necessary to be done for the purpose of a trade or business is ' work undertaken by the principal ' within the meaning of this section." Cole was temporarily lent or let on hire. We submit that section 5 is declaratory of the law and applies to the present case.

MOORE, L.C.J.
Oct. 29.

MOORE, L.C.J. : I am of opinion that there was evidence in this case on which the County Court Judge could find as he did find that the applicant was entitled to compensation from the respondent, William Calvert.

I have no doubt that the applicant was in the employment of Harpur, the intervenient, at a wage of fifteen shillings per week and his food, and was bound to obey all Harpur's reasonable orders, including the liability of being sent as Harpur's servant to do certain work for Calvert as the latter might direct.

On the occasion in question he was temporarily lent to Calvert by Harpur, but by virtue of section 5 (1) of the

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(1) [1909] 1 K.B. 389 (2) [1914] 3 K.B. 1013

Workmen's Compensation Act (Northern Ireland), 1927, for the purposes of that Act Harpur remained his employer, and liable to compensate him if injured in his employment should the applicant elect to proceed against him.

But this has not happened.

The applicant on the advice of Counsel claimed the right to sue Calvert as "principal" under the provisions of section 6.

Section 6 of this Act is *totidem verbis* the same as section 4 of the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 50), and its effect was fully considered by the Irish Court of Appeal in *Meier* v. *The Lord Mayor of Dublin* (1). Summarising that decision, it would appear that section 6 is intended to give the workman an alternative claim against the principal should he elect to take advantage of the section, but he can not sue both; election once made is final. This might be in his interest to do if, as in Meier's case, the contractor, his immediate employer, proved to be financially unsound. In the present case there is no suggestion of such a position, and we do not know for what reason the applicant thought it better to proceed against Calvert as principal. It may be said that Harpur may find it hard to be made liable, either directly under section 5 or indirectly under section 6, for an accident which did not occur on his own premises and which may have been occasioned by men working under the directions of Calvert, but if the policy of the Act is to keep the workman fully indemnified in all events, it is not for us to criticise it. In any event Meier's case establishes the proposition that his remedy as against either Harpur, his own employer, or against Calvert as "principal" is an alternative remedy, not joint or several, and having elected to sue the latter he has foregone his own rights (if they existed) as against the former.

But the provisions of section 6 do not put Calvert in the same position towards the applicant as Harpur qua employer might have been. There are at least three limitations before liability can attach. The first is a general one:

(A) Did the accident arise out of his employment? If it did not the statute will afford him no relief.

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(1) [1912] 2 I.R. 129

(B) The second is what I call a particular one, because it is only derived from the words of section 6. It is, if (A) is answered in the affirmative, was the employment " in the course of or for the purposes of (Calvert's) trade " or business . . . . for the execution by or under (Harpur) of the whole or any part of any work undertaken by (Calvert)? I have translated the words of the statute by reference to the present actors in the scene before us.

(C) The third limitation is contained in sub-section 4 of the section, which provides (again summarizing) that the premises on which the accident occurred are to be under the control of the principal.

However, it is now admitted that this is out of the case as the quay or pier on which the ship was discharging was Calvert's property.

Turning back to the first of the necessary conditions I have stated, I think there was ample evidence on which the County Court Judge could find as he must have found that the applicant was injured by something occurring in the sphere of his employment. I have no doubt that Harpur, who engaged him and paid him, was his employer, and that the nature of his employment was that on the occasion in question he was to go with his horse and cart to obey Calvert's reasonable and lawful directions in and about the discharge from a ship of a cargo of coal. Mr. Warnock has urged upon us the contention that he was only directed by Calvert " to cart " coal, and therefore if he were injured by something outside carting it would be out of the scope or sphere of his employment. As a matter of fact he had canted tubs—four or five tubs of coal swung out from the vessel into his cart—when the accident occurred over the next tub. Calvert says in his evidence that he said nothing to him about canting because it was recognised to be part of his duty. It was also proved by Markey, a fellow employee, that on other occasions when Calvert had not a man or men to cant the tub the carter did it himself. I would as a matter of ordinary interpretation hold that if a man is engaged to cart, it would be his duty *prima facie* both to load and to unload his cart like any ordinary carrier. I do not think that the applicant himself did anything outside the ordinary sphere of his employment in assisting in the loading of his own cart, and that there was abundant evidence to enable the judge to find that the accident arose in the sphere of his employment. This then takes this case out of *Plumb* v. *Cobden Flour Mills & Co., Ltd.* (1)

We are then brought to the interpretation of section 6 about which most of the contention before us was waged.

Was Calvert contracting with Harpur "in the course of or for the purposes of his trade or business . . . . for the execution by or under the contractor . . . . of any part of any work undertaken" by him (Calvert)?

Lord Cozens-Hardy in *Hockley* v. *West London Timber and Joinery Company* (2), p. 1016, observes of section 4 of the Act of 1906 that this "is one of the most difficult sections, if not the most difficult, in this very difficult Act." As section 6 of the Act of 1927 (Northern Ireland) is identical with section 4, I venture to apply to it a similar observation.

In the first place, was the work on which the applicant was engaged at the moment of the injury work in the course of Calvert's ordinary trade or business? In his evidence he states that he is a coal merchant and importer of coal. Mr. Murphy has contended before us all through his argument that he is nothing but a mere distributor of coal, and that the chartering of a ship, the purchase of a cargo of coal, the possession of a quay and shed are all but incidents necessary and preliminary to the stage when distribution of coal begins, but not part of his ordinary business. He has referred us to several authorities, including *Skates* v. *Jones & Co.* (3) (the skating rink case), and *Hockley* v. *West London Timber and Joinery Co.* (2), to which I have referred above.

Lord Cozens-Hardy used there as an illustration the case of the spinner whose business of spinning requires a boiler, and says that he is not liable to pay compensation to an injured workman of a person employed to replace a boiler, because the spinner is not a boiler maker and the repair, though necessary for his business, was not arranged for in the course of his business, which was spinning.

(1) [1914] A.C. 62

(2) [1914] 3 K.B. 1013

(3) [1910] 2 K.B. 903

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This illustration has been used in several other cases and I respectfully agree with it and adopt it. But on the facts of the present case it is wholly inapplicable. I am clearly of opinion that the business of a coal merchant and importer of coal consists in purchasing, importing, unloading and, if necessary, storing coal until distribution can be carried out, and that all such acts in combination, or rather in sequence, are done and performed in the course of the coal merchant and importer's business.

But there remains the next essential: is there evidence that this work was "undertaken" by the principal within the meaning of the section?

Of course this can not arise in any case where it has been held that the employment was not in the course of the business. So in *Hockley* v. *West London Timber and Joinery Company* (1). This case has been pressed very strongly upon us by Mr. Murphy, and I feel I ought to say something about it. We, so far as possible, follow decisions of the English Courts not only out of respect for the eminent Judges who there preside, but also in regard to the comity of Courts; but we in this Court of Appeal are only bound by decisions of the House of Lords. I am so far from satisfied with the decision in that case that I shall endeavour to distinguish it if I can. I say with all respect that, even if I could not so distinguish it and was pressed accordingly to dismiss the applicant's claim in this case, I should reluctantly decline to follow it. I should also like to make a further observation. The question of whether or not the accident occurred in the course of an employment in the execution of work undertaken by the principal is largely a question of fact for the original tribunal. These cases, such as the present and *Hockley* v. *West London Timber and Joinery Company* (1), are border line cases. It is open to the County Court Judge to come to a decision of fact on either side of the line if there is evidence to support it. In *Hockley* v. *West London Timber and Joinery Company* (1) the judge found as a fact that the stacking of the timber was not undertaken by the respondents in the course of their business but was a separate business. In *Dittmar* v. *Owners*

(1) [1914] 3 K.B. 1013

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of Ship V 593 (1) (the case of a contract for bringing out lighters to St. Vincent), the County Court Judge held that this was an execution of work undertaken in the course of the Company's business. In each case, as there was evidence to support this finding, the Court of Appeal did not interfere. In the present case the learned County Court Judge, as in *Dittmar* v. *Owners of Ship V* 593 (1), has found that the employment was undertaken in the course of the business of Calvert or he would not have given his award.

Lord Cozens-Hardy in his Judgment gave several illustrations. I suggest another. My view would be that once a man contracts to supply £1000 worth of yarns, he has undertaken the work of providing them. Is the payment he must make for £500 worth of raw cotton out of which to spin the yarns not made in respect of work so undertaken? If he hires a messenger to go to the Bank with the money and he is injured on the way, why is the spinner not principal within the section? This is not a case of his boilers; it is in respect of the actual commodity he has contracted to deliver in the execution of what he has undertaken in his ordinary trade. I can not but think that it is in part execution of the undertaking. If he has to contract with a carter to bring the cotton to his spinning mill, is not that equally another part of the execution of the work undertaken? Of course, if the work is once "undertaken," there can not be intermediate stages towards completion, some of which are to be included in the event of an injury and others excluded from the undertaking. *Hockley* v. *West London Timber and Joinery Company* (2) met this by holding that the purchase of the timber was not part of the work undertaken. Here I fail to follow that decision apart from the evidence of custom in the case. It is true, if I am right in this, and I only venture to put it forward with some doubt, that if an injury happens to a carter's man while delivering the raw cotton for which the principal is liable, it, as Mr. Murphy has suggested, would *prima facie* also apply to railway porters handling the goods anywhere on the journey; but this effect is first of all greatly narrowed down by sub-

(1) [1909] 1 K.B. 389 (2) [1914] 3 K.B. 1013

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section (4), which limits such a liability to accidents occurring on, in, or about the spinner's premises, and, in addition, I come to the conclusion that the mere insertion of such a clause would go some distance in support of the argument that but for such insertion contractors for carriage anywhere outside might in the hypothetical case make the spinner liable as principal. It is further answered by experience and common sense, because I do not suppose that any injured person would be likely to proceed against the spinner as "the principal" where he could elect to have a Railway Company as respondent qua "employer." I have instanced the case of a special contract, but it is now admitted that any operation in the course of his business undertaken by the principal stands on the same footing. This is the second meaning of "undertaken" per Farwell, L.J., in *Skates* v. *Jones & Co.* (1) quoted with approval by Lord Cozens-Hardy. The whole Court, however, in *Hockley* v. *West London Timber and Joinery Company* (2) decided that according to the custom of the particular trade the respondents could not be held to have undertaken the stacking of their own raw material as part of their business and this is enough for me at present. In the case before us, however, no corresponding custom is alleged or proved, and I hold that the work of moving the coal from ship to shed, in the course of which the injury was sustained, was part of the work undertaken by Calvert the coal merchant and importer as "principal" within the meaning of the section.

I also think that as Harpur, on my view of the facts, would have been liable to pay compensation to the applicant, he must now, under sub-section (2) of the clause, indemnify Calvert.

I think Calvert's appeal fails as against the respondent, but succeeds as against Harpur.

Cole has succeeded in this appeal against Calvert having nothing to do with Harpur, and Calvert should pay Cole his costs in any event. Calvert has succeeded against Harpur, and Harpur should pay Calvert his own costs of the appeal.

(1) [1910] 2 K.B. 903 (2) [1914] 3 K.B. 1013

Best, L.J.: The grounds of William Calvert's appeal against the order of the learned County Court Judge are that he was not the employer of the applicant when the accident occurred, and if this point should be decided adversely to him, that he is in that event entitled to an indemnity from Henry Harpur either directly or through his contract with the said Henry Harpur.

The appellant is a coal merchant and importer of coal and at the time of the accident he had at his quay at Rostrevor a cargo of coal for discharge from a ship there and for conveyance to his shed in Warrenpoint. From his evidence it appears that a lorry of his own was used in the transference of the cargo from the ship to the shed and that for the speedier despatch of the business he had asked Harpur to send two horses and two carts to assist in the discharge. Calvert paid Harpur twelve shillings and six pence a day for the hire of each horse and cart and man in charge thereof, Henry Cole, the applicant, being in charge of one horse and cart, and Frank Markey being in charge of the other.

These men, Cole and Markey, were each hired by Harpur for fifteen shillings a week and food, which was of the estimated value of another fifteen shillings a week. Their job was to cart coal from the ship, and Mr. Warnock for Harpur contended that Cole was employed only to "cart" coal and that it was no part of his business to "cant" the tub conveying the coal from the hold of the vessel to the cart. He wished to show, if possible, that the accident to Cole did not arise out of his employment at all.

I cannot agree with him in this proposition. Cole in his evidence says that Calvert told him to watch the tub and to cart the coal. Markey says that when the man who usually canted was not there, we did the canting, and Calvert says that he did not tell either Cole or Markey to cant the tubs as it was part of their work, and that his contract with Harpur was to cart the coal from the boat to the shed. In this state of the evidence it is not only permissible, but, I think, one is coerced, to come to the conclusion that the canting of the tub which resulted in the accident was on the occasion in question part of Cole's work and that the accident did

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arise out of Cole's employment. Accordingly *Plumb v. The Cobden Flour Mills Co., Ltd.* (1), and the other cases on this point cited by Mr. Warnock do not apply.

It is clear also from the evidence in the case that in consequence of the provisions of section 5, sub-section (1), of the Workmen's Compensation Act (Northern Ireland), 1927, Harpur remained for the purposes of the Act Cole's employer, and that he was liable to compensate Cole if the latter should be injured in the course of his employment. Instead of proceeding against Harpur, however, Cole has elected to seek compensation from Calvert under section 6 sub-section (1) of the Act, and it is from the award made in Cole's favour that Calvert has appealed, claiming that he was not Cole's employer at the time of the accident, and if he were such employer, that he must be indemnified by Harpur in virtue of the contract made with him.

Cole was directly employed by Harpur but was he a "workman employed in the execution of the work" contemplated by section 6 of the Act ? If he were such a workman, he is entitled to be compensated by Calvert as if the latter were his immediate employer. We must see, then, if the case comes within the provisions of section 6.

The trade or business of Calvert is to import coal and to sell it. He makes a contract with Harpur to cart the coal from the boat to the shed and it is in my opinion obvious that the contract was made in the course of or for the purposes of Calvert's trade or business. His immediate purpose was to have the coal transferred from its place in the ship to the shed from which it could be delivered to his customers. If the contract were not made for the purpose of Calvert's trade or business, I fail to see for what purpose it was made. Further, was the contract made "for the execution by or under the contractor (Harpur) of the whole or any part of any work undertaken by the principal (Calvert)" ? In my opinion the contract was so made.

Calvert was not only a coal merchant, but he was a coal importer. Part of the work incidental to the importing of coal and its subsequent sale is to get the coal conveyed from the ship at the quay to the shed where it is to be stored until its actual sale and delivery to a customer, and I think that for the purposes of his trade or business Calvert contracted with Harpur for the execution by or under Harpur of part of the work proper to Calvert's undertaking. Indeed from Calvert's evidence it appears that he, Calvert, himself directly undertook part of the work, for he says that he had a motor lorry and that he asked Harpur to send two horses and carts to assist in the discharge.

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(1) [1914] A.C. 62.

I think that the case of *Dittmar v. Owners of Ship V 593* (1), cited by Mr. Johnson for Cole is directly in point, and that the case of *Hockley v. West London Timber and Joinery Co.* (2), so strongly relied on by Mr. Murphy for Calvert, has no application to the facts of this case. In *Hockley v. West London Timber and Joinery Company* (2) it was found as a fact and Lord Cozens-Hardy, M.R., says there is ample evidence for the finding that the stacking of the timber which gave rise to the accident was done for the purpose of the principal's trade, but that it was not any part of the work undertaken by the principal. I think there is abundant evidence to justify a finding that part of the work undertaken by the principal (Calvert) was the conveyance of the coal from the ship to the shed, and that Cole was at the time of the accident a workman employed in the execution of this work. Cole is, accordingly, in my opinion, entitled to be compensated by Calvert, and in this respect I agree that the award of the learned County Court Judge was right. But I further think that Calvert is entitled by virtue of section 6, sub-section (2) of the Act to be indemnified by Harpur, who independently of section 6 would have been liable to pay compensation to Cole.

I agree that the results indicated by the Lord Chief Justice must follow.

Solicitor for the appellant : *J. C. W. Rea.*

Solicitor for Henry Harpur, the contractor : *Thomas Shillington.*

Solicitors for the applicant : *Johnson & Rutherford.*

J. McC.

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(1) [1909] 1 K.B. 389.

(2) [1914] 3 K.B. 1013.

Ch.D.
1930.
Nov. 1.

IN RE NANCY STEWART, DECEASED;
McALLISTER v. STEWART (1).

(1930. No. 207.)

Will—Construction—Bequest to parish priest officiating at time of death of testatrix—Whether curate carrying out duties of parish priest entitled to such bequest. Charitable Donations and Bequests Act, 1844 (7 *&* 8 *Vict.*, *c.* 97, *s.* 16).

N.S. by her will bequeathed the residue of her estate to the parish priest of L., officiating at the time of her decease, to be applied by him for the benefit of the Roman Catholic Church in the parish as he, in his discretion, should think fit, and in the event of the failure of such bequest, testatrix bequeathed the said residue to the said parish priest of L., for his own use and benefit.

The testatrix died within three months of the execution of her will and as the property consisted almost entirely of land, the charitable bequest failed. There was no parish priest of L. at the time of the death of testatrix but all the duties of the office were being discharged by the curate of the parish.

Held, that the curate was entitled to the ultimate residue bequeathed to the parish priest for his own use and benefit.

SUMMONS for the determination of certain questions arising under the will of Nancy Stewart, deceased.

By her will, dated 20th April, 1929, the testatrix, having directed her executors to sell her farm and premises and to pay various pecuniary legacies, devised and bequeathed the residue of her estate to the parish priest of Loughguile officiating at the time of her decease, to be applied by him in and for the benefit of Magherahoney Roman Catholic Church, as he should in his discretion think fit. If for any reason this bequest should become invalid or fail, the testatrix bequeathed the residue of her estate to the said parish priest of Loughguile for his own use and benefit. The testatrix died on 8th June, 1929, and as her estate consisted almost entirely of lands, the bequest for the benefit of the Roman Catholic Church became void as contravening section 16 of the Charitable Donations and Bequests Act, 1844. The Reverend John T. Healy, parish priest of Loughguile, had died on 5th October, 1928, and, at the date of the death of the testatrix, no successor to him had been appointed, but the duties of the parish priest were being temporarily carried out by the Reverend Robert Rogan, the curate of the parish.

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(1) In the Chancery Division before Wilson, J.

The question was whether or not the bequest of the ultimate residue to the parish priest of Loughguile, officiating at the time of the death of the testatrix, for his own use and benefit, failed.

In the affidavit of the Reverend James Hendley, filed on behalf of the executors, the following facts were deposed to :—In accordance with the Canon Law of the Roman Catholic Church, upon the death of the parish priest in a parish, the curate, if only one curate, or the senior curate, if more than one, carries out all the duties of a parish priest until the appointment of a new parish priest to the parish. He has full control and management, and exercises all the functions and faculties of a parish priest and carries on the work of the parish exactly as a parish priest does. The curate thus acts as a temporary parish priest and receives the income from the parish pending the appointment of a successor to the deceased parish priest.

McSparran for the executors referred to *Corcoran v. O'Kane* (1).

T. J. Campbell, K.C., for the Reverend Robert Rogan :

For all practical purposes the Reverend Robert Rogan was the parish priest of the parish of Loughguile at the time of the death of the testatrix and he is accordingly entitled to the residue of her estate.

Porter for the next of kin :—

The term "parish priest" in the will should be construed as meaning the parish priest holding office.

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(1) [1913] 1 I.R. 1.

A person who is temporarily carrying out the duties of the parish priest does not come within this description. There being no parish priest of Loughguile at the time of the death of the testatrix, the gift of the residue must fail.

Wilson, J.

Wilson, J.: The testatrix by her will bequeathed the residue of her estate to the parish priest of Loughguile, officiating at the time of her death, to be applied by him for the benefit of Magherahoney Roman Catholic Church, and if such bequest should fail she bequeathed the said residue to the said parish priest for his own use and benefit.

At the time of the death of the testatrix there happened to be no parish priest of Loughguile but under the Canon Law of the Roman Catholic Church the curate of the parish had full control and management and was exercising all the functions and faculties of the parish priest during the vacancy.

The question which I have to decide is, did the deceased by the words which she used, intend that the bequest of the residue of her estate should go to the person who was carrying out the duties of parish priest to be applied for the benefit of the Church, or did she intend that it should only go to a person who was actually appointed parish priest of Loughguile.

In the circumstances I think that upon the true construction of the will, the bequest in question is a good bequest to the Reverend Robert Rogan who was acting as parish priest at the time of the death of the testatrix.

Solicitor for the executors: *Thomas S. McAllister.*

Solicitor for the Reverend Robert Rogan: *J. J. Magee.*

Solicitor for the next of kin: *John P. McCann.*

J. D. C.

REVERE TRUST, LTD. v. WELLINGTON HANDKERCHIEF WORKS, LTD. (IN VOLUNTARY LIQUIDATION) (1).

C.A.
1930.

Nov. 5.
Dec. 11.

Company—Winding Up—Debenture—Floating Charge within three months of winding up—Meaning of "cash paid" Agreement for floating charge—Registration—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69, *s.* 212)—*Power of Appellate Tribunal to review findings of fact.*

The defendant company was owned by S. J. McC., who was its managing director. In February, 1930, he obtained a loan of £300 from the plaintiffs for his company on the security of his own promissory note and also of the defendant company's debenture for £300, which should have been registered within 21 days, viz., on or before 13th March, 1930. As S. J. McC. was endeavouring to effect a flotation of his company as a public company, he requested the plaintiffs not to register the debenture until the last moment, which they agreed to do. On 13th March, S. J. McC. asked for further time, and it was ultimately agreed that in lieu of such registration plaintiffs should advance S. J. McC. £400 on the security of a new promissory note and a debenture for that amount out of which sum he should forthwith repay the £300 previously borrowed with interest thereon. This was intended to give S. J. McC. the additional time he required without prejudicing the plaintiff's security. In pursuance of this arrangement the plaintiffs gave S. J. McC. their own cheque for £400. W., who acted as solicitor to both parties, attended with S. J. McC. at the Bank on 15th March when the cheque was presented for payment, and when the latter received the £400 he immediately in pursuance of the agreement handed to W. the sum of £310 in payment of principal and interest on foot of the first loan which sum the latter immediately lodged to the credit of the plaintiff company. The debenture for £400 was duly registered. The contemplated flotation did not materialise and the defendant company went into voluntary liquidation.

Held, by the Court of Appeal (Andrews and Best, L.JJ.) that under section 212 of the Companies (Consolidation) Act, 1908, the mortgage debenture for £400 was invalid except to the extent of £90, the net amount received by the defendant company on foot of the promissory note and debenture for £400, with interest thereon at five per cent.

APPEAL from the judgment of WILSON, J.

The following statement of the facts is taken from the judgment of Andrews, L.J.

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(1) In the Court of Appeal before Andrews and Best, L.JJ.

The defendant company was practically owned by one S. J. McCrory who was its managing director. In February, 1930, McCrory obtained a loan of £300 from the plaintiffs for his company on the security of McCrory's promissory note and also of the defendant company's debenture for £300, which latter should have been registered within 21 days, namely on or before 13th March. The money was paid by crossed cheque. As McCrory was endeavouring to effect a flotation of his company as a public company he requested the plaintiffs not to register the debenture until the last moment. This they consented to do. When 13th March arrived and everything was ready for registration, McCrory asked for further time, and it was ultimately agreed that in lieu of such registration the plaintiffs should advance McCrory £400 on the security of a new promissory note and a debenture for that amount, out of which sum he should forthwith repay the £300 previously borrowed with interest thereon. In this way it was hoped to give M'Crory the additional time he required without prejudicing the plaintiffs' security. In pursuance of this arrangement plaintiffs gave McCrory their cheque for £400. Mr. Wolff, who acted as solicitor for both parties, attended with McCrory at the Bank on 15th March when the cheque was presented for payment, and when the latter received the £400, he immediately, in pursuance of the agreement, handed to Wolff the sum of £310 in payment of principal and interest on foot of the first loan, which sum the latter immediately lodged to the credit of the plaintiff company. This debenture for £400 was duly registered on 3rd April. The contemplated flotation did not prove possible, and a receiver was appointed on behalf of the plaintiffs on 20th May, 1930.

Black, K.C., (with him *Warnock*) for the appellants :

In re Orleans Motor Company Limited (1) has a bearing on the precise point at issue in the present case. In that case Parker J., said at p. 45 " the

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(1) [1911] 2 Ch. 41.

"section (that is section 212 of the Companies (Consolidation) Act, 1908) was designed apparently to prevent companies on their last legs from creating floating charges to secure past debts or for moneys which do not go to swell their assets and become available for creditors." *In re Hayman, Christy & Lilly Limited, Christy v. the Company* (1), *Astbury, J.*, said at p. 285 " I think the expression 'except to the amount of any cash paid to the company' means except to the amount of any cash absolutely and unconditionally paid to the company." Debentures issued within three months of a winding up in consideration of a loan of the amount for which they were issued, repayable in a week, would obviously be invalid after the repayment of the loan—the payment would amount to redemption. We rely on *In re W. G. M'Cleave & Co., Ltd.* (2) which is an even stronger case than *In re Orleans Motor Company, Limited* (3).

We rely on section 212 of the Companies (Consolidation) Act, 1908; we must look at the section, see what it was intended to cover, then look at the facts of the case and see what in reality those facts were. The report in *Heydon's Case* (4) states that it was resolved by the Chief Baron and the other Barons of the Exchequer "that for the secure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered :—

(A) What was the common law before the making of the Act ;

(B) What was the mischief and defect for which the common law did not provide ;

(C) What remedy the parliament hath resolved and appointed to cure the disease of the commonwealth ;

(D) The true reason of the remedy ; and then the office of all the Judges is always to make such construction as shall suppress the mischief and advance the remedy."

(1) [1917] 1 Ch. 283.
(2) 47 I.L.T.R. 214.
(3) [1911] 2 Ch. 41.
(4) 3 Co. Rep. 7b.

C.A.
1930.

REVERE TRUST, LTD. *v.* WELLINGTON HANDKERCHIEF WORKS LTD.

The present is pre-eminently a case which comes within this statement of the law in *Heydon's Case* (1). What we have to consider is, what is the legal inference from the admitted facts. In *Cooper v. General Accident Assurance Corporation* (2) Viscount Cave, C., said "The question is, not what are the facts, but what inference is proper to be drawn from the facts proved ; and upon that point, as has often been said, the appellate tribunal is not less competent to judge than the Judge who actually hears the case.

(He also referred to *In re Olderfleet Shipbuilding Co.*) (3)

Lowry, K.C. and *McCoy* for the respondents :—

The whole transaction is a question of fact. We rely on *In re Columbian Fireproofing Company, Limited* (4). In that case Neville, J., said at p. 765, "The question is, what is the meaning in this section of the words 'at the time of the creation of the charge' ? I think whether any particular payment comes within these words must always be a question of fact depending upon the circumstances of the particular case." *In re Columbian Fireproofing Co., Ltd.* (4) went to the Court of Appeal (5). We rely on the judgments of Cozens Hardy, M.R., and Farwell, L.J., in the Court of Appeal. These judgments are strongly in favour of the respondent's contention. All that is important is, was McCrory, or was he not, a free agent to do what he liked with the cheque for £400. The real question is, has the money been advanced at the time of the transaction ? The present case is quite different from *In re Orleans Motor Company, Limited* (6) In the latter case, Parker, J., said at p. 45, "It is impossible to hold that any money was actually paid to the company at all." In the present case Wilson, J., found that the £400 was paid to the company, and we contend that there was no agreement that could be enforced by the plaintiffs. There is nothing that could have prevented McCrory from walking out of the Bank with the whole £400 in his pocket. There was nothing to show that there was not physical control of the money here, an element that was not present in *In re Orleans Motor Company, Limited* (1). This latter case is only an authority for the very special facts on which it was decided.

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(1) 3 Co. Rep. 7b.

(2) [1922] 2 I.R. 214 at p. 216.

(3) [1922] 1 I.R. 26.

(4) [1910] 1 Ch. 758.

(5) [1910] 2 Ch. 120.

(6) [1911] 2 Ch. 41.

McCrory was the accredited representative of the company. The request for the postponement of registration came from the defendants.

We submit that the order of Wilson, J., was right.

Black, K.C. (in reply) :—

Farwell, J., said in his judgment in *In re Columbian Fireproofing Co., Ltd.* (2) "it is a question of what are the circumstances of each particular case and what is the real substance of the transaction."

The defendant company would never have got this sum of £400 if they had not agreed to pay back the sum of £310. A contract to give a debenture is in a peculiar position as section 105 of the Companies (Consolidation) Act, 1908, provides that, a contract with a company to take up and pay for any debentures of the company may be enforced by an order for specific performance.

Cur. adv. vult.

ANDREWS, L.J.
Dec. 11.

ANDREWS, L.J.: The sole question raised in this appeal relates to the true construction of section 212 of the Companies (Consolidation) Act, 1908, and its application to the facts of the present case.

The defendant company was, it appears, practically owned by one S. J. McCrory, who was its managing director. In February, 1930, McCrory obtained a loan of £300 from the plaintiffs for his company on the security of his promissory note and also of the defendant company's debenture for £300, which latter should have been registered within 21 days, namely, on or before 13th March. The money was paid by crossed cheque. As McCrory was endeavouring to effect a flotation of his company as a public company he requested the plaintiffs not to register the debenture until the last moment. This they consented to do. When 13th March arrived and everything was ready for registration, McCrory asked for further time; and it was ultimately agreed that in lieu of such registration the plaintiffs should advance McCrory £400 on the security of a new promissory note and a debenture for that amount, out of which sum he should forthwith repay the £300 previously borrowed, with interest thereon. In this way it was hoped to give McCrory the additional time he required without prejudicing the plaintiffs' security. In pursuance of this arrangement plaintiffs gave McCrory their cheque for £400. Mr. Wolff, who acted as solicitor for both parties, attended with McCrory at the Bank on 15th March when the cheque was presented for payment; and when the latter received the £400 he immediately, in pursuance of the agreement, handed to Wolff the sum of £310 in payment of principal and interest on foot of the first loan, which sum the latter immediately lodged to the credit of the plaintiff company. This debenture for £400 was duly registered on 3rd April. The contemplated flotation did not prove possible, and Mr. S. H. Jackson was appointed receiver on behalf of the plaintiffs on 20th May, 1930.

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(1) [1911] 2 Ch. 41.
(2) [1910] 2 Ch. 120.

Section 212 of the Act of 1908 provides that where a company is being wound up, a floating charge on the undertaking or property of the company created within three months of the commencement of the winding up shall, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid, except to the amount of any cash paid to the company at the time of or subsequently to the creation of, and in consideration for, the charge, together with interest on that amount at the rate of five per cent. per annum. It is admitted that the company was not solvent at the time of or immediately after the creation of the charge; and the next question for decision therefore is whether the whole £400 was " cash paid to the company at the time of or subsequently to the creation of, and in consideration for, the charge."

There is no doubt that of the £400 only £90 became available for the purposes of the company, and indeed portion of this latter sum was earmarked for payment of Mr. Wolff's costs. Mr. Wolff admitted in unambiguous language that "it was clearly understood that the £310 would be paid back out of the £400." In these circumstances, was the £310 "cash paid" within the section ?

If there were no authority to guide us, I would have little difficulty in holding on principle that a sum paid on the clear understanding (subsequently effectuated) that it would be immediately repaid should not be regarded as "cash paid." It is our duty in my opinion to look, not at the mere form, but at the reality of the transaction. The object of the section was to prevent companies which were *in extremis* giving charges on their property for past debts to the prejudice of other creditors. If the device adopted in this case were countenanced by the Court, it seems to me that the section would become valueless, as it could be evaded in every case by the mere interchange of cheques, the cheque in favour of the company including the past debt and the new advance, and the cheque in favour of the lender being for the amount of the past debt. Any such procedure would be a mere paper or bookkeeping transaction without substance or reality. The very use of the word "cash"—not "sum of money" is significant; and in my opinion "cash" cannot be said to be "paid" within the section unless it is unconditionally paid so as to be immediately available for the general purposes of the company. It is obviously not so available if it is only received by the right hand to be paid back to the lender with the left.

The view which I have expressed is fully supported by authority. In *In re Orleans Motor Co., Ltd.* (1), Parker, J., held that, although three cheques from the company's guarantors to the Bank passed through the company's hands (and apparently remained in their possession for a few days), they were never part of the company's assets to do what it liked with, as the

(1) [1911] 2 Ch. 41.

company was under obligation to hand them over to the Bank in discharge of its overdraft; and, accordingly, it was impossible to hold that any money was actually paid to the Company at all. The debentures were really to be issued on account of the guarantee, and so to secure an antecedent independent transaction. "The section," he said, "was designed apparently to prevent companies on their last legs from creating floating charges to secure past debts or for moneys which do not go to swell their assets and become available for creditors."

In *In re Hayman, Christy & Lilly, Ltd.* (1), where debentures were issued as security for loan and current accounts, they were held invalid *qua* loan account because it was a past debt, and *qua* current account because, although subsequent to the creation of the security a sum of £447 had been advanced on current account, it had been all paid off prior to the winding up. In his judgment Astbury, J., referred to *In re Orleans Motor Co., Ltd.* (2), and said that in his opinion the expression "except to the amount of any cash paid to the company" means "except to the amount of any cash absolutely and unconditionally paid to the company."

Mr. Lowry contends for the plaintiffs that even if Parker, J's., interpretation of the section be correct (which he does not admit) its condition as to the payment going "to swell the company's assets" has been complied with, as one way of swelling assets is by getting rid of liabilities, such as the original advance of £300 in the present case. His argument is, however, conclusively answered by the judgment of O'Connor, M.R., in *In re McCleave & Co., Ltd.* (3), where a clear distinction is drawn between a cash payment to the company and the payment off of an existing liability of the company. The latter is not a *cash* payment to the company to do what it likes with as its own moneys.

Mr. Lowry also in the first instance contended that the payment of £400 was absolute as there was no

(1) [1917] 1 Ch. 283.
(2) [1911] 2 Ch. 41.
(3) 47 I.L.T.R. 214.

legal liability on the part of McCrory to pay back the £300 and interest when he cashed the plaintiffs' cheque for £400; but he was ultimately obliged to admit, as was the fact, that there was a binding agreement between the parties for its repayment, for breach of which an action for damages would have lain. Forbearance by the plaintiffs at McCrory's request to register the first debenture, coupled with the subsequent payment of the £400, constituted ample consideration to support such an agreement.

Finally Mr. Lowry relied upon the view of Neville, J., in *In re Columbian Fire-Proofing Co., Ltd.* (1) at p. 765, that the question whether any particular payment comes within the words of the section "at the time of the creation of the charge" is a question of fact, and that Wilson, J., expressly based his judgment on findings of fact. The learned Judge, however, did not find as a fact that the whole £400 was paid by the plaintiffs to the company unconditionally to do what they liked with, nor, indeed, would there have been in my opinion any evidence to support such a finding. When McCrory received payment from the Bank he held it in my opinion as to £300 and interest in trust for the plaintiffs, and as to the balance only for the defendants. Further, were it necessary to do so, the power of an appellate tribunal to review findings of fact cannot be questioned. It has been frequently dealt with and need not be again stated. See *Coghlan v. Cumberland* (2), *Dominion Trust Co. v. New York Life Insurance Co.* (3), *Cooper v. General Accident Assurance Co.* (4), *Harris & Sheldon, Ltd. v. Belfast Co-operative Society* (5).

In my opinion there is nothing in the findings of Wilson, J., which prevents us giving effect to the conclusions at which we have arrived.

We shall therefore make an order discharging the judgment of Wilson, J., dated 4th July, 1930, and declaring that the debenture, dated 15th March, 1930,

(1) [1910] 1 Ch. 758.
(2) [1898] 1 Ch. 704.
(3) [1919] A.C. at pp. 257-8.
(4) [1922] 2 I.R. 38 and 214.
(5) Unreported.

Andrews, L.J.

is invalid except to the amount of £90 with interest thereon at the rate of five per cent. per annum. To this limited measure of relief the defendants were willing to submit by their defence and counterclaim filed on 27th June, 1930; and they had in fact tendered the amount by letter of 14th June, 1930, which also contained an adequate undertaking as to costs. By letter of 16th June the plaintiffs' solicitors admitted the tender, but it was not accepted, and the action proceeded. This correspondence is admitted, and it is further not contested that this is not an action in which money could have been paid into Court under Order XXII.

In our opinion in the foregoing circumstances the plaintiffs should have their costs against the defendants up to the filing of the defence and counterclaim on 27th June, 1930, whilst the defendants will be entitled to their costs of action against the plaintiffs as from that date. The defendants are also entitled to their costs of this appeal. The costs of the one party will be set off against the other and execution will issue only for the balance.

Best, L.J.

Best, L.J.: This is an appeal by the defendants from the order of Mr. Justice Wilson, dated the 4th day of July, 1930, by which it was declared that the mortgage debenture dated the 13th day of March, 1930, issued by the defendant Company for the sum of £400 with interest thereon at five per cent. per annum constitutes a first charge upon all the property and assets of the company comprised therein, and defendants ask that in lieu thereof it should be declared that the said mortgage debenture is invalid except to the amount of £90 with interest at the rate aforesaid.

Mr. S. J. McCrory, who was managing director of the defendant company, wished to float it as a public company, and for that purpose was in need of money to meet its obligations; he interviewed the plaintiff company early in February of this year and was referred by them to Mr. Alexander S. Wolff, their solicitor. On February 20th, McCrory got £300 from the plaintiff company on the security of a promissory note and the defendants' debenture for that sum, which debenture should have been registered within twenty-one days from the date of its execution, that is, on 13th March at the latest. McCrory requested the plaintiff company not to register the debenture until the last moment fearing that registration would interfere with or spoil the intended flotation. Everything was ready for registration and McCrory asked for further time and agreed with plaintiffs through Mr. Wolff that if a sum of £400 were advanced to him he would give a debenture for this amount and would, out of the said sum of £400, repay the sum of £300 already advanced together with interest thereon. Accordingly plaintiffs on 15th March paid the sum of £400 to McCrory, the debenture for £400 having been executed on 13th March, and it was duly registered on April 3rd.

The defendant company had undertaken to pay the said sum of £400 by instalments of £200 and £200 on the 13th day of May and the 13th day of June, 1930, respectively, but on the 12th day of May, the day before the first instalment became payable, the defendant company passed a resolution for voluntary liquidation, and now contend that the debenture, having been created within three months of the commencement of the winding up of the defendants, is invalid except as to the sum of Ninety pounds. They rely upon section 212 of the Companies (Consolidation) Act, 1908, which provides that where a company is being wound up, a floating charge on the undertaking or property of the company created within three months of the commencement of the winding up shall, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid, except to the amount of any cash paid to the company at the time of or subsequently to the creation of, and in consideration for, the charge, together with interest on that amount at a rate of five per cent. per annum.

It is not disputed that the defendant company was insolvent immediately after the creation of the charge, but they contend that, as the sum of £310 (the £10 being for interest) was admittedly paid back out of the £400 advanced on March 15th, in reality only the sum of £90 was advanced by the plaintiffs at the time of the creation of the debenture and in consideration for the charge. The learned Judge decided against the defendants, holding as a fact on the evidence that on March 15th "the plaintiffs paid the defendants £400 "in cash and when that was paid the defendants for "some appreciable time owed the plaintiffs £700, and "the fact that the defendants repaid the plaintiffs "£310 out of the cash just previously paid to them "did not alter the fact that the plaintiffs had paid the "defendants £400 at the time of the creation of the "debenture and in consideration for the charge within "the meaning of section 212."

The result turns upon the true construction of this section as applied to the facts of the case. Mr. Black for the liquidator relies on the decision of Parker, J., in *In re Orleans Motor Co., Ltd.* (1), as being clearly in favour of his contention. On the evidence in that case the learned Judge found it impossible to hold that any money was actually paid to the company at all; three cheques passed through its hands in the circumstances set out in the report, but they were never part of the company's assets to do what it liked with since the Company was under an obligation to hand them over to the Bank in discharge of its overdraft, and he expressed the view that the section was designed apparently to prevent companies on their last legs from creating floating charges to secure past debts or for moneys which do not go to swell their assets and become available for creditors.

Astbury, J., in the case of *In re Hayman, Christy & Lilly, Ltd., Christy v. The Company* (2), adopts Mr. Justice Parker's view of the design of the section and holds that the expression "except to the amount of "any cash paid to the company" means "except to "the amount of any cash absolutely and unconditionally paid to the company."

In the present case, I think the sum of £400 was never in the hands of the company to do what it liked

(1) [1911] 2 Ch. 41. (2) [1917] 1 Ch. 283.

with or to swell its assets and become available for creditors. Indeed Mr. Lowry had to admit that there was an agreement between plaintiffs and McCrory for the immediate repayment of the £300 and interest, and I am of opinion that plaintiffs would have been entitled to bring an action for breach of that agreement against the defendants. But Mr. Lowry relies strongly on the finding of fact by the learned Judge that on 15th March plaintiffs paid the defendants £400 in cash and when that was paid the defendants for some appreciable time owed the plaintiffs £700, and he relies upon the dictum of Neville, J., in *In re Columbian Fireproofing Co., Ltd.* (1), where the learned Judge, at p. 765, in discussing the meaning of the words "at "the time of the creation of the charge," says he thinks "whether any particular payment comes within these words must always be a question of fact depending upon the circumstances of the particular case." Mr. Justice Neville's decision was affirmed by the Court of Appeal, whose decision is reported (2), and Farwell, L.J., at p. 123, says "it is a question of what are the circumstances of each particular case and what is the real substance of the transaction."

I respectfully agree with this statement of the law but in applying it to the present case come to a conclusion directly opposite to that contended for by Mr. Lowry. I think that looking at the substance and reality of this transaction, the only cash paid to the company at the time of or subsequently to the creation of, and in consideration for, the charge was the sum which remained out of the £400 after the repayment of the £300 with interest thereon.

Mr. Lowry further pressed the argument that as the learned Judge found the fact in his favour, this Court should not disturb the finding, but the facts are not in dispute and the real controversy is as to the proper inferences to be drawn from those facts.

The right of the appellate Court to draw its own inferences from the facts is well established as can be seen from the judgment of Andrews, L.J., in the case of

(1) [1910] 1 Ch. 758. (2) [1910] 2 Ch. 120.

Cooper v. The General Accident Fire and Life Assurance Corporation, Ltd. (1), where the cases on the subject are reviewed at p. 56 of the report. I am accordingly of opinion that only the sum of £90 was advanced by the plaintiffs at the time of or subsequently to the creation of, and in consideration for, the charge, and that the debenture is security only for this amount together with interest thereon at the rate of five per cent. per annum.

The defendants by their defence delivered on 27th June, 1930, admitted liability for this sum and they had by letter of 14th June tendered to plaintiffs the sum of £90 with interest thereon up to 17th June and had undertaken to pay plaintiffs' costs. In this state of affairs plaintiffs should, I think, have their costs up to 27th June and defendants should have the costs of the action as from that date together with the costs of this appeal.

Solicitors for the appellants: *Martin Turnbull & Co.*
Solicitors for the respondents: *Porter, Morris & Co.*

J. McC.

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(1) [1922] 2 I.R. 38.

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Nov. 17, 21.

Education—" School "—Non-compliance with school attendance order—Duty of parent to cause child to attend " school "—Onus of proof—Power of Education Authority to Select a School—Education Act (Northern Ireland), 1923 (13 & 14 *Geo.* 5, *c.* 21), *ss.* 30, 31, 32, 33, 88, 97.

Prior to 1911 there existed in E., in the County of D., the E. School, which was carried on under the control of the Commissioners of National Education. In 1911, the Commissioners withdrew their grants to the school and it was closed on the ground that it was not any longer needed. Representations were made by people who resided in the neighbourhood of the school to the Ministry of Education from time to time that the latter should take the school over and open it and have it carried on as a public elementary School, but the Ministry always refused to take it over and re-open it.

In July, 1928, a large number of the residents of E. townland and adjoining townlands themselves re-opened the E. school and appointed a teacher. They paid the salary of the teacher and all other outgoings as no financial assistance was granted towards the school by the Ministry of Education. There were about 40 children attending the school, including M. McK., a child of the defendant.

In May, 1929, the E. school was inspected by an Inspector of the Ministry of Education who reported that the secular instruction given there was not efficient. The Ministry then sent a notification to J. T. (a person who had conducted a correspondence with them relative to the E. school) stating that they required the replacement of the existing teacher by an efficient teacher, and also that they required certain improvements to the school building to be effected. In September, 1929, the E. school was again inspected, and it was then ascertained that the requirements of the Ministry had not been complied with, and the Ministry duly notified the Education Authority as to the Ministry's requirements and the fact of non-compliance.

On 20th January, 1930, the defendant was duly served with a warning notice, pursuant to section 32 of the Education Act (Northern Ireland), 1923. On 3rd February, 1930, the defendent was duly served with a summons to attend the local school attendance committee to show cause why a school attendance order should not be made against him. On 12th February, 1930, the defendant attended before the local school attendance committee and stated that his children were attending the E. school and that he wished them to continue to attend there, and that he considered the education given at the E. school was as good as that given at G. or

E. G. (two public elementary schools in the district), and that he declined to choose any other school.

After hearing the defendant, the school attendance committee made an order that the defendant should cause his child to attend G. public elementary school, but the defendant continued to send his child to the E. school.

At the R. Petty Sessions held on 2nd May, 1930, the defendant was charged with non-compliance with the school attendance order.

The justices by a majority dismissed the complaint, but stated a case for the opinion of the King's Bench Division.

Held, by the King's Bench Division (Moore, L.C.J., and Brown, J.) that the justices were correct in point of law in dismissing the complaint as the school attendance order on which it was founded was invalid.

CASE STATED for the opinion of the High Court of Justice in Northern Ireland, King's Bench Division, by the Justices sitting at Rathfriland Petty Sessions held on 4th November, 1930, as follows :—

This is a case stated by us the Justices sitting at Rathfriland Petty Sessions, pursuant to 20 & 21 Vic., c. 43, for the opinion of the King's Bench Division of the High Court of Justice in Northern Ireland.

At the Rathfriland Petty Sessions, held on the 2nd May, 1930, the complainant, who is the school attendance officer of the Down County Regional Education Committee, charged the defendant with non-compliance with a school attendance order made in respect of his child, Maggie McKee, who was thereby required to attend Glaskermore public elementary school.

The facts as proved or admitted were that :— Prior to 1911 there existed in the townland of Emdale, in County Down, a school named Emdale school, which was carried on under the control of the Commissioners of National Education. In the year 1911 the said Commissioners withdrew their grants to the said school, and it was closed on the ground that it was not then any longer needed.

In and from the year 1923 down to the present time there was a strong desire on the part of the residents in the townland of Emdale and adjoining townlands (including the parents of children who resided near Emdale school) that the school should be re-opened. Representations were made by said residents to the

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Ministry of Education from time to time that the latter should take the school over and open it and have it carried on as a public elementary school. Emdale school is more convenient for many of the children living in its neighbourhood than either Glaskermore public elementary school or Edengarry public elementary school which are the nearest public elementary schools to the said Emdale school.

The Ministry of Education have at all times refused to take over or re-open Emdale school, or to recognise it as an efficient school.

In July, 1928, a large number of the local residents of Emdale townland and adjoining townlands themselves re-opened Emdale School and appointed a teacher. The salary of the teacher and all other outgoings were duly paid, but no financial assistance from the said Ministry was granted towards same. The said school has been regularly kept open since July, 1928.

Emdale school was re-opened in the month of July, 1928, and there are about 40 children of school age attending the said school, two of whom are children of the defendant, Thomas McKee, namely, Maggie McKee who attained 14 years of age on 3rd March, 1930, and David McKee who attained 9 years of age on 14th February, 1930.

In May, 1929, Emdale school was inspected by an inspector of the Ministry of Education, and following such inspection a notification, dated 30th May, 1929, from the Ministry of Education, and addressed to "J. Thompson, Esq., Emdale, Loughbrickland, County Down," the person who conducted a correspondence with the Ministry of Education relative to said Emdale school with a copy of section 88 of the Education Act (N.I.), 1923, and an extract from Inspector Welply's report made on 17th May, 1929, were duly posted to said J. Thompson alleging *inter alia* that the secular instruction given in said school was not efficient, and stating that the Ministry required the replacement of the then teacher by an efficient teacher, and also requiring certain improvements as to increased window lighting of the premises and that the Ministry directed that their requirements should be complied with prior to 31st August, 1929.

In September, 1929, Emdale school was again inspected and it was then ascertained that the requirements of the Ministry had not then been complied with, and the Ministry duly notified the education authority as to its requirements and of the fact of non-compliance.

Glaskermore public elementary school is between one mile and two miles distant from the residence of Thomas McKee.

On the 20th January, 1930, the defendant was duly served with a warning notice pursuant to section 32 of the Education Act (Northern Ireland), 1923, and on the 3rd February, 1930, the defendant was duly served with a summons to attend the local school attendance committee to show cause why a school attendance order should not be made. On the 12th February, 1930, the defendant attended before the local school attendance committee, and stated that his children were attending Emdale school and that he wished them to continue to attend there, and that he considered the education given at Emdale school was as good as that given at Glaskermore or Edengarry, and that he declined to choose any other school. After hearing the defendant, the local school attendance committee made a school attendance order whereby it was ordered that the defendant should cause his said child, Maggie McKee, to attend Glaskermore public elementary school.

This order was duly served upon the defendant, but has not been complied with, and the defendant has continued to send his said children Maggie and David to Emdale school.

The witnesses called for complainants were the complainant, Thomas J. Whiteside, W. J. Cairns, an official of the Ministry of Education, and Castor J. Love, a surveyor employed by the Down Regional Education Committee.

The complainant, Thomas J. Whiteside, admitted that a proper roll book or register of the attendance of scholars at said Emdale school was kept at said school, and that said school was at all times open to inspection by the Ministry and its officials. He gave no evidence as to efficiency or inefficiency of the said school. No evidence was given by any person that Emdale school was a school in which the secular instruction given to children was efficient or that defendant's child was receiving efficient elementary education, but Mr. Cairns produced the file of correspondence and Notices from the Ministry of Education relative to said school, and purported to put in same in evidence. Mr. McSpadden for defendant objected to the form and substance of such evidence, and submitted that it was not proper or relevant evidence of the facts sought to be proved thereby. Mr. Cairns admitted that the Ministry of Education had no knowledge of the efficiency or inefficiency of said school or the secular instruction there given since the month of October, 1929, that he never saw the said school, and had no personal knowledge as to its efficiency or otherwise since October, 1929, or at any time, and that he was not in a position to prove whether or not since October, 1929, the requirements of said Ministry had been complied with, and he admitted that he was not in a position to contradict the allegation of defendant that the said school prior to the issue of said school attendance order, and since then, afforded the children of defendant efficient elementary education, or the allegation that an efficient teacher had been appointed prior either to service of said school attendance order or summons thereunder. Mr. Love admitted that he had no knowledge of the school or district, and he only gave evidence of the distance from said Emdale school to the defendant's residence on the latter being pointed out to him on his map by complainant, Thomas J. Whiteside.

Mr. Rutherford, for the complainant, submitted that on these facts and admissions the Justices should convict the defendant.

Mr. McSpadden, for the defendant, submitted:—

1. That Emdale school was an efficient voluntary school, providing for the pupils thereat efficient elementary education.

2. That no evidence contrary to said Emdale school being efficient and providing efficient elementary education since the month of October, 1929, had been given by complainant or his witnesses.
3. That section 30 sub-section 2 (*b*) and section 97 of the Education Act (Northern Ireland), 1923, afforded the defendant a complete defence.
4. That proper notification had not been sent by the Ministry of Education to the persons by whom the said school was conducted that the said Ministry considered that the secular instruction at the said school was inefficient.

The Justices by a majority, Major J. D. McCallum dissenting, dismissed the complaint on the following grounds :—

That the complainant, Mr. Whiteside, on the evidence he and his witnesses tendered and on their admissions on cross-examination had failed to make out a case for conviction, inasmuch as no evidence was placed before the Court to prove non-compliance or otherwise with the requirements of the Ministry of Education as in their letter of May 30, 1929, that it was admitted by the witnesses for complainant that they could not contradict as a fact the allegation of defendant that his children were on and prior to the making of the school attendance order of 12th February, 1930, in receipt of efficient elementary education at Emdale School, nor contradict, as a fact, that neither they nor the Ministry of Education had any knowledge as to the efficiency or inefficiency of said school, or the secular instruction given at said school since October, 1929.

That no evidence was furnished by or for complainant as to the condition of the school when the summonses were issued.

That the conduct of the Regional Committee was unsatisfactory throughout in allowing a school, if condemned by the Ministry of Education in August, 1929, to be carried on since that time without being able to furnish the court with evidence as to its efficiency or inefficiency since October, 1929.

And the opinion of the Court is sought as to whether we were right in dismissing the said complaint.

Murphy, K.C., and *Warnock* for the complainant :—

We submit that the Justices made a mistake of law. A school attendance order having been made the Justices had no power to go behind it. There is no evidence that the Emdale school did provide efficient elementary instruction.

We submit that the Justices should have convicted the defendant. [They referred to sections 30, 31, 32 of the Education Act (Northern Ireland), 1923, and to *Holloway v. Crow* (1), and *Bevan v. Shears* (2).]

Davison, K.C., and *Sheil* for the defendant :—

We submit that the Education Act (Northern Ireland), 1923, is a penal statute so far as the sections that have been referred to are concerned. The Court of Petty Sessions decided that there was no evidence on which they could act. We rely on section 97 of the Act. If the secular instruction given to children who are required to attend school is not efficient, section 88 obliges the Ministry of Education to send a notification to that effect to the persons by whom the school is conducted. There was no "notification" sent to those conducting the school. The sending of a letter to Thompson is not sufficient to make the respondent McKee liable in a criminal prosecution. The Ministries of Northern Ireland Act, 1921, provides that each Ministry shall have an official seal which shall be officially and judicially noticed, and also that each Ministry shall be a body corporate. The Ministry of Education being a body corporate could only act through its seal. The complainant did not satisfy the Court of Petty Sessions that there was a reasonable ground which entitled them to convict the defendant. *Holloway v. Crow* (1) is distinguishable from the present case. On account of the nature of these sections of the Education Act (Northern Ireland), 1923, there is an onus on the complainant to prove a *prima facie* case, it is not sufficient for him merely to prove that a school attendance order had been made. The present case is outside section 30 as the child is attending a school. It is only where the parent declines to send his child to school at all that there is authority to make an order that the child shall attend a particular school.

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(1) [1911] 1K.B. 636.

(2) [1911] 2K.B. 936.

The onus is on the complainant to show that attendance at Emdale school does not constitute a defence. No evidence was given before the Magistrates as to the efficiency of the school. The onus should not be on the defendant. A penal Act must be construed strictly. Section 88 has not been carried out strictly by the Education Authority. The complainant has not put himself in the position to prosecute successfully. It was not proved to the satisfaction of the Magistrates that the secular instruction given to children attending Emdale school was not efficient. There was no evidence of any direction of the Ministry of Education, nor is there any evidence of fixing of time nor of non-compliance. The onus is on the complainant to bring himself within section 88.

(They referred to *Bevan v. Shears* (1).)

Murphy, K.C. (in reply):—

In Rex v. West Riding of Yorkshire Justices. Ex parte Broadbent (2).

Lord Alverstone, C.J., said : " If an attendance order is made under s. 11 (that is section 11 of the Elementary Education Act, 1876, which is similar to section 32 of the Education Act (Northern Ireland), 1923) it remains effective subject to certain questions of removal or alteration in the circumstances." An order once made under section 32 remains effective. Section 32 does not affect the present case at all.

The word " school " must be read subject to limitations. If a "school" is not efficient, it is not a " school" for the purposes of the Act. If the Ministry of Education has duly notified the education authority and the education authority has summoned the parent to appear before it, the Court of Petty Sessions cannot go behind the attendance order.

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(1) [1911] 2 K.B. 936.

(2) [1910] 2 K.B. 192 at p. 197.

MOORE, L.C.J. : This case arose on a Summons for breach of an Order, dated February 12th, 1930, whereby the defendant, being the parent of Maggie McKee, a child of over six and under fourteen years of age, as defined by section 34 of the Education Act (Northern Ireland), 1923, and Bye-Laws of the Education Authority, neglected to perform the duty imposed on him as such parent (guardian) by section 30 of the said Act of causing the said Maggie McKee to attend school as prescribed by regulations made by the Ministry of Education, Northern Ireland.

I agree with Counsel that a penal statute must be construed so far as possible in favour of the subject. Mr. Murphy says there are inconsistencies in the Act, which makes our task all the more difficult.

We ought also to be on our guard against leaning on cases decided under a different statute unless we are sure that the language of that statute is the same as our own.

Dealing with this statute, I have no doubt that the governing clauses of the Act, for the purposes of this case, are sections 30, 31, 32, 33. They are the root machinery of the code.

Reading and summarizing section 30, if without excuse, it becomes the duty of every parent in Northern Ireland to send children within certain age limits to school : This is in *pari materia* with the bye-law in *Holloway v. Crow* (1), relied on by Mr. Warnock.

" School " is nowhere defined in the Act (except for the purposes of Part IX. (See section 63). In consequence, it is not limited to " Public Elementary School " or to " School approved of by the Ministry " ; in my judgment, it must mean " a school," unrestricted, in the ordinary sense of the word.

That the Act contemplates the existence of such schools conducted without the approval of the Ministry is shown by sections 88 and 97, to which I will refer presently.

(1) [1911] 1 K.B. 636.

It is quite plain from reading these sections that parents are divided into two classes, and two only, viz., those who do send their children to school in the wider sense, which includes all schools, and those who do not, or refuse to do so.

Excuse can be found for the latter class on one or other of the several grounds specified in section 30, one of which, 2 (*b*), is that the child is receiving " efficient elementary education in some other manner," which can only mean other than by going to some school, but the defence is not limited to the statutory ground.

Under section 32 if to the education authority it appears that a parent has neglected or failed to cause his child to attend school or failed to perform his duty in that respect, they may begin proceedings against him by the several stages therein provided, ultimately culminating in an attendance order.

It will be at once seen that this section is intended to cover, and only can cover, the class of parent who refuses to send his child to any school; it, in my judgment, can not apply to any parent who is sending his child to any school within the meaning of section 30.

This is rendered more plain by the provision in section 33 that if the parent does not satisfy the Court that he or she has made all reasonable efforts to enforce compliance with the order, a penalty will be imposed—clearly pointing to a case of non-attendance at the school specified in the order where a wilful child has proved too much for the parent. There would be no " effort to enforce compliance " if the words merely meant that the parent was to change the child from one school to the other approved of.

Turning back to section 32, I am satisfied that the education authority has no jurisdiction to set its machinery in motion against any parent who is not neglecting to send his child to school; and that any order purporting to be made against such a parent under that section is invalid.

I am further of opinion that the education authority has no power to select any school for the attendance of the child except in the sole instance where the parent does not do so.

I should again point out that under section 32 the parent's choice is unrestricted as to "the school," and it need not necessarily be either a public elementary school or a school approved by the Ministry; and if an order is made at all, it should be in respect of the school selected by the parent.

In *Thompson v. Rose* (1) the father declined to name "a certified efficient school" but care must be used in considering this case, as the duty devolved on the Justices, not on the educational authority, and the Court had no evidence that any school would receive the child.

In the present case I am of opinion—

(a) that the defendant, who was sending his child to school, did not require to prove any exemption under section 30 (2);

(b) that the education authority had no right to treat him as a defaulting parent;

(c) that, as he selected Emdale school for his child, and did not refuse to select a school, the Authority had no power to name any other school, and that for these reasons the whole order was invalid.

Mr. Murphy has relied on sections 88 and 97 whereby it is respectively provided that attendance at schools where certain conditions are not observed shall not be a defence to proceedings under Part VI. of the Act, meaning sections 30-33, to which I have referred.

I must reconcile this if I can; if I am correct in the views I have already arrived at, these sections can only apply to the case of a parent who is proceeded against for not sending his child to any school and who, looking for a defence after the proceedings have begun, then sends the child to a school or institution pending the hearing, but not the school mentioned in the order.

This may appear to be far-fetched, but if there are inconsistencies in the Act, we may be forced to some extremes to reconcile them. But in any event, I hold that these two sections are entirely subordinate to the main provisions of the Act which I have quoted.

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(1) 65 L.T. 851.

The next question is how far the Justices are entitled to go behind the order of the education authority if its validity is challenged. It is true that under section 33 they are only to be satisfied that the order has not been complied with in the case of the particular parent. *Belper School Attendance Committee v. Bailey* (1) shows that the party is not limited to the three excuses mentioned in the Act. I can not express a final opinion until the matter is further argued. I am not at all sure that the education authority is a judicial or quasi-judicial body. If it is not, its decisions can not be reviewed by this Court on certiorari. While there is an appeal under section 90 (3) from the decision of the Justices, there is none from the decision of the education authority, which would support the view that all is open before the Justices. I think they may be entitled to enquire if the order was regularly made, to see if the jurisdiction to make it ever existed.

In *Rennie v. Boardman* (2) the Court found that the order was regularly made.

If, for instance, an attendance order directed a parent to send his named child to a certain school, I think proof would be admissible to establish before the Court asked to enforce it, that the respondent was not the parent or guardian of the child and in fact had never seen it, and that so far as he was concerned the order was made without jurisdiction.

In the present case the validity of the order was not challenged before the Justices, but all the facts are found in the case to enable us to decide this question, and this has been strongly pressed on us in argument by Mr. Sheil and Mr. Davison, without finally deciding whether Justices have the power, having regard to the case of *Holloway v. Crow* (3) where the bye-law resembles very much the words of our Statute, to go behind the attendance order. Certainly on the facts as stated by the Justices in the case before us, we in the

(1) 9 Q.B.D. 259.

(2) 111 L.T. 713.

(3) [1911] 1 K.B. 636.

High Court are enabled to form an opinion whether or not the order was valid, and I am clearly of opinion that it was invalid.

As I think on the facts the proceedings were misjudged from the start, I think the defendant was originally not obliged to do more than satisfy the education authority that his child was attending some school in the ordinary sense of the word; that Emdale was such a school; that they were not therefore entitled to put him on any so-called "defence" further: that they had no power by treating him as a person neglecting to send his child to school, which he was not, to name a school to which the child should be sent, and that, accordingly, the Justices had no power to enforce penalties for disobedience to an invalid order and acted rightly in dismissing the case, though on other grounds.

On the ground that we can not advise them to enforce an order wrong from the commencement, I think they were correct in point of law in dismissing the case, and the question should be answered accordingly.

BROWN, J.

BROWN, J.: Under section 30, sub-section (1), of the Education Act (Northern Ireland), 1923, the parent of every child between the ages of six and fourteen is compelled to send the child to school unless there is a reasonable excuse for its non-attendance. There is no definition of "school" in the Act, but it is clear that the term is not confined to schools under the control of the Ministry. A parent who sends his child to any school at home or abroad satisfies the obligation contained in this section.

Section 32 sets out the procedure to be followed by the education authority in the case of a parent who has neglected or failed to perform his duty in causing his child to attend school. The education authority has power to make a school attendance order requiring the parent to cause his child to attend a particular school named in the order, and by section 33 on complaint made that such school attendance order has not been complied with, a court of summary jurisdiction may impose a fine upon the parent or make other orders set out in the section.

Section 32 has no reference to a parent who sends his child to school and in my judgment the education authority had no power to make the attendance order against the defendant in this case. If that is so, the order was invalid, and the justices before whom the complaint was made had no jurisdiction to make any order against the defendant.

The complainant relies on section 88 of the Act. This section provides that if, on inspection by the Ministry, it is found that any school does not provide efficient elementary education, and if on receiving notification to that effect, the persons by whom the school is conducted do not comply with any requirements of the Ministry—then what is to happen ? Not that such school shall be deemed not to be a school within the meaning of section 30—but merely that the Ministry shall notify the education authority concerned. A mere notification to the education authority that a school is not being properly conducted —whatever may be the object of such notification, cannot enlarge the scope of section 32, which in my judgment, as I have said, applies only to parents who do not send their children to any school. At the end of section 88 is a clause which in the view I have taken of sections 30 and 32 has no effect : " It shall be no defence by a parent in any prosecution that may be instituted against him by an education authority under Part VI. of this Act that his child was in attendance at such school."

The only prosecution that may be instituted against a parent under Part VI. of the Act is that under section 33, based on the school attendance order, which can only be made where a parent has not sent his child to any school. It may be argued that the last line of section 88 " that his child *was* in attendance at such school " must mean was in attendance at such school at the time the school attendance order was made, from which it should be inferred that such a school should be deemed not to be a school within the meaning of section 30. Well, the answer to that argument is that this is a penal statute and must be construed strictly, and if that was the meaning intended it could easily have been stated in so many words.

It was submitted to us that the school attendance order being good on its face, the Justices could not go behind it.

In *Holloway v. Crow* (1), the defence relied on was a by-law which stated "A child between thirteen and fourteen years of age shown to the satisfaction of the local authority to be beneficially employed shall not be required to attend school. Before the justices the respondent in answer to the charge said in effect that he had kept the girl at home owing to sickness in his family in order that she might help in nursing. The justices held that the prosecution had not sufficiently proved that the girl was not beneficially employed, and that if she were employed in nursing the sick she was beneficially employed. They therefore dismissed the complaint."

In the judgment of Lord Alverstone the justices were wrong on both points.

Lord Alverstone says "the burden of proof was not on the prosecution to show that the child was not beneficially employed; the by-law directs that the beneficial employment must be shown to the satisfaction of the education authority, the onus of proving beneficial employment is therefore on the parent. With regard to the decision of the justices that nursing was a beneficial employment, in my judgment they were not intended to be the judges of whether a particular occupation was or was not a beneficial employment, and in giving that decision they usurped the functions of the education authority."

I think the effect of this case is that justices are bound by the facts found by the Ministry as to the lack of efficiency of the school at the time of the inspection.

Section 97 gives the defendant a defence that at the time of the hearing of the prosecution his child *is* attending a school which meets the requirements of that section. Changes may have been made in a school

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(1) [1911] 1 K.B. 636.

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since the inspection by the Ministry and a school which had been inefficient may be efficient at the time of the hearing. The onus of proving this is on the defendant.

The Justices were wrong to dismiss this case on the grounds stated by them. The complainant had not to prove the defendant's case. If a defendant relies on the defence given by section 97, he must prove the same.

In my judgment the Justices had no jurisdiction to hear this complaint as the school attendance order on which it was founded was wholly invalid.

Solicitors for the complainant: *Johnson & Rutherford.*

Solicitor for the defendant: *R. S. Heron.*

J. McC.

COTTON & ORR v. MILLAR. (1).

C.A.
1929.
Nov. 21.

Civil Bill Ejectment—"Signed by an Attorney"—Signature of Attorney in the name of his Firm.—(14 & 15 *Vic.*, *c.* 57) *s.* 60.

By 14 & 15 Vict., c. 57, section 60, it is provided that "in all ejectment cases the civil bill process shall be signed by an attorney, who shall set forth his place of residence thereon."

Held, by the Court of Appeal (Moore, L.C.J., and Andrews, L.J.) that a civil bill process signed by an attorney in the name of his firm was sufficient.

Case Stated by Best, L.J., on an appeal from an order of the County Court Judge of Down who had "nilled" a civil bill Ejectment for overholding of a dwelling house and premises situate in Church Street, Portaferry, in the County of Down.

The case came before Best, L.J., as Judge of Assize for the County of Down at Downpatrick, at the Summer Assizes, 1929.

The Case Stated was as follows:—

I was satisfied that the plaintiffs were entitled to a decree for possession of said dwellinghouse and premises save for one point, viz., Was the signature to the said civil bill a sufficient signature "by an attorney" within the meaning of section 60 of 14 & 15 Vic., c. 57? Chambers appeared for the plaintiffs, and M. J. Johnston, solicitor, appeared for the defendant.

The following facts relevant to the point in issue were either proved or admitted before me:—

Dawson Cotton, solicitor, is the sole member of the firm of Martin H. Turnbull & Co., and practises at 7 Chichester Street, Belfast, under the name of Martin H. Turnbull & Co.

The said Dawson Cotton is registered as practising as Martin H. Turnbull & Co., both for the issue of his licence as a solicitor and under the Registration of Business Names Act, 1916.

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(1) In the Court of Appeal before Moore, L.C.J., and Andrews, L.J.

The civil bill in this case was signed by the said Dawson Cotton with his own proper hand but was signed by him as Martin H. Turnbull & Co.

The said Dawson Cotton is an attorney.

The question of law is whether or not on the foregoing findings of fact the civil bill process was " signed by an attorney " within the meaning of section 60 of 14 & 15 Vic., c. 57.

If the Court is of opinion that the signature to the civil bill is sufficient the order of the County Court Judge will be reversed, and there will be a decree for possession with costs in the County Court only (the plaintiffs not asking for any further costs).

If the Court is of opinion that the signature is insufficient, the order of the County Court will be affirmed with costs in the County Court only (the defendant's solicitor not contesting the case either in the Court below or before me).

J. D. Chambers for the plaintiffs :—

There is nothing in section 60 of 14 & 15 Vic., c. 57, to suggest that the civil bill must be signed by the solicitor in his own proper name. The object of the section is to make certain that the civil bill should come to the attention of the solicitor. In *Reg. v. The Justices of Kent* (1) it was held that a notice of appeal signed in the appellant's name by the clerk to his attorney with the appellant's authority was sufficient. In *Smith and Jago v. Brown* (2) it was held that a bill for business by two attornies in partnership signed by one in the name of the firm, is a sufficient subscription within the statutes 3 Jac 1, c. 7, and 2 Geo. 2, c. 23, although the signatures do not contain the christian names of the partners. In *Owen v. Scales* (3), a bill for work done by two attornies in partnership, was delivered signed by one of them, in the following terms : " This is our bill. For self and Robert Owen.—J. H. Dixon." It was held that this was a sufficient signature within the statute 2 Geo. 2, c. 23, s. 23. In *Baird v.*

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(1) L.R.8.Q.B. 305.

(2) 1 C. & J. 542.

(3) 10 M. & W. 657.

Kirk (1), the ejectment process had been filled up at the attorney's dictation, and signed with his name by his clerk under his immediate inspection, it was held sufficient.

I submit that the object of the section has been effected once it is proved that the solicitor has affixed his signature. All that the legislature requires is that the civil bill shall have the personal attention of the solicitor. It was only necessary to prove that what was done, was done under the specific authority of a solicitor. Sometimes the name of the firm is very much better known than the name of the individual carrying on the business of the firm.

I submit that upon the cases and upon the reading of the section the signature in the name of the firm is sufficient.

Hume, for the defendant:—

I have not come to contest the question that has been raised by the Case Stated. I appear out of courtesy to the Court, but am willing to give any assistance in my power. In *Ex parte Blain* (2), James, L.J., said at p. 533, " We have not yet introduced into our law the notion that a firm is a *persona*."

In *Ex parte Corbett* (3), the same judge said, " There is no such thing as a firm known to the law." In *Reg. v. Cowper* (4) it was held by Fry, L.J., agreeing with the judgment of the Queen's Bench Division, Lord Esher, M.R., dissenting, that in order to entitle the plaintiff in an action in a county court to the costs of entering a plaint by a solicitor, the solicitor must sign the particulars, and a lithographed statement of the solicitor's name on the particulars is insufficient.

MOORE, L.C.J.

MOORE, L.C.J. : The civil bill in this case was signed by Dawson Cotton with his own proper hand, but was signed by him as Martin H. Turnbull & Co. It was signed by the proper person ; the only question for us, is, the proper person having signed it, did he sign it in the proper way ? The Act of 14 & 15 Vic., c. 57,

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(1) 9 I.C.L.R. Ap. 4.

(2) 12 Ch. D. 522.

(3) 14 Ch. D. 122, at p. 126.

(4) 24 Q.B.D. 533.

C.A. 1929.

COTTON AND ORR v. MILLAR.

MOORE, L.C.J.

section 60, provided that "in all ejectment cases the civil bill process shall be signed by an attorney, who shall set forth his place of business thereon." The object of that was obvious, it was to give the defendant notice of who was the plaintiff's solicitor, and where he might be found. In that case the defendant could much more easily find the place of business by the business description than by the name of the individual solicitor, and therefore I think, for that purpose, it would be absolutely correct and proper that the business name of the solicitor should be entered on the ejectment process. The signature in this case fulfills both requirements of the Act of 14 & 15 Vic., c. 57. I think the signature was good and that we should answer the question, was the civil bill process signed by an attorney within the meaning of section 60 of 14 & 15 Vic., c. 57, in the affirmative.

ANDREWS, L.J.

ANDREWS, L.J.: I agree with the decision of the Lord Chief Justice. We have been informed during the hearing of this case that certain divergences of practice have existed in regard to the signature of civil bill processes in ejectment cases, and that it is desirable that uniformity should be established. I am clearly of opinion that the signature in this case is a sufficient compliance with the statute. The principle underlying the proviso of the section is that an officer of the Court should give his authority to the institution of proceedings which from their very nature might be of a vexatious or harrassing character. There is nothing, however, in the section which requires the signature to be in the solicitor's own name, and the affixing of his firm's name by a solicitor, is in my opinion, a sufficient compliance with the requirements of the Act.

The case is governed in principle by the decision in *Smith and Jago v. Brown* (1), which has already been referred to. For these reasons I entirely agree.

Solicitors for the plaintiffs, *Martin H. Turnbull & Co.*
Solicitors for the defendant, *Johnston & McCourt.*

(1) 1 C. & J. 542.

J. McC.

SCOTT v. COSGROVE (1).

K.B.D.
1930.

Dec. 5.

Intoxicating Liquor-Sale of during prohibited hours—Licence transferred before prosecution—No direction by Resident Magistrates to record conviction on licence—Conviction not entered in the register of licences—Licensing Act, 1872 (35 & 36 *Vic*., *c*. 94, *s*. 78)—*Intoxicating Liquor Act* (*Northern Ireland*), 1923 (13 & 14 *Geo*. 5, *c*. 12, *s*. 1).

At a Court of Petty Sessions held at B. on 17th July, 1930, the Resident Magistrates made an order convicting the defendant J. C., who was a person duly licensed to sell intoxicating liquor by retail, of the offence of selling intoxicating liquor during prohibited hours. They, however, declined to endorse the conviction on the licence or direct it to be entered in the register of licences, on the ground that the defendant had previously disposed of his public house and transferred the licence.

They held that as the defendant had not the licence in his possession when the prosecution took place, they were unable to carry out the direction contained in section 8 (2) of the Intoxicating Liquor Act (Northern Ireland), 1923, that "such conviction shall be entered in the proper register of licences and shall be directed to be recorded on the licence of the offender." They stated a case for the opinion of the King's Bench Division.

Held, by the King's Bench Division (Moore, L.C.J., and Best, L.J.) that the Resident Magistrates should have directed the conviction to be entered in the register of licences and to be endorsed on the licence.

CASE STATED at the instance of the complainant for the opinion of the High Court of Justice in Northern Ireland, King's Bench Division by H. Toppin and P. J. O'Donoghue, Resident Magistrates, acting in and for the Petty Sessions District of Belfast, pursuant to the Summary Jurisdiction Act, 1857, as follows:—

At a Petty Sessions holden in and for the Petty Sessions District of Belfast on the 17th day of July, 1930, before us, the undersigned Resident Magistrates, acting in and for the Petty Sessions District of Belfast in the County of the City of Belfast, District Inspector Andrew Scott, Royal Ulster Constabulary, the above-named complainant, charged John Cosgrove, the above-named defendant, in and by a certain summons for that he, being a person licensed to sell intoxicating liquor by retail, to be drunk and consumed on the premises where sold, did open his house and place of sale situate at 34 Garmoyle Street, in the City of Belfast, for the sale of intoxicating liquor, during a period during which said premises were required by law to be closed, to wit, at or about the hour of 9-15 o'clock a.m., on Sunday, the 8th day of June, 1930, contrary to the statutes, and the parties respectively being then present, the complainant conducting his case in person, and the defendant with his Counsel, Mr. T. J. Campbell, K.C., and his solicitor, Mr. Donnelly, the charge was duly heard before us, and upon such hearing we made the following Order under the 78th section of the Licensing Act, 1872, amended by section 1 of the Intoxicating Liquor Act (Northern Ireland), 1923, so as to require, closing of licensed premises during the whole of Sunday :—

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(1) In the King's Bench Division before Moore, L.C.J., and Best, L.J.

> " Defendant is hereby convicted of the said offence and ordered to pay for fine the sum of Ten Pounds, and for costs the sum of two shillings in seven clear days, and in default of payment to be imprisoned in the gaol at Belfast for the period of three calendar months without hard labour, unless the said sums be sooner paid. This conviction not to be recorded on defendant's licence as the licence has been transferred and defendant has no licence on this date."

And Whereas the said complainant hath pursuant to the provisions of the statute firstly before-mentioned, given us notice that he was dissatisfied with our determination as being erroneous in point of law, in so much that we did not record the said conviction on the defendant's licence. And whereas the said complainant hath required us to state and sign a Case setting out the facts and grounds of such determination for the opinion thereon of the King's Bench Division of the High Court of Justice in Northern Ireland.

Now We, the said Resident Magistrates, pursuant to the said Notice and the provisions of the said firstly before-mentioned statute, do hereby state and sign the following Case :—

Upon the hearing of the said complaint the following facts were proved or admitted before us :—

The defendant was on Sunday, 8th June, 1930, the proprietor of a seven-day licensed public house at 34 Garmoyle Street, Belfast, and he resided in the living portion of the same premises with entrance from Dock Street. On that morning about 9-15 a.m. two men came to defendant's house, knocked at the door, spoke to defendant and went away. The defendant went into his public house and returned forthwith with two bottles of beer. He followed the two men into a house in the next street and handed them the beer.

There was no controversy as to these facts or as to the inference to be drawn from them, namely, that the defendant had opened his licensed premises on the Sunday named in the summons for the sale of intoxicating liquor, but the following facts were admitted or proved for the defendant to show that he had realised that he ought no longer to seek to conduct the licensed trade himself, and that he had, therefore, transferred his licensed premises to another :—

The defendant had advertised for a tenant of his licensed premises prior to the date of the commission of the offence under consideration, namely, on 20th May, 1930, and he had, prior to the hearing but subsequent to the date of the commission of the offence, let his licensed premises to one Charles Daly, under an agreement dated 23rd June, 1930, for one year with option in favour of the said Charles Daly for a further year, and defendant had ceased to occupy the said licensed premises, which were thereupon occupied by the said Charles Daly. This change of occupation had taken place prior to the hearing, and the said Charles Daly had obtained a transfer at Petty Sessions in Belfast on 3rd July, 1930, under the Public House (Ir.) Act, 1855, the District Inspector having stated that he had no objection to this transfer.

Having convicted the defendant as hereinbefore stated we were then asked to record the conviction and endorse the record on his licence, but we held as a fact that the defendant had parted with the custody of his licence, and with the possession of the licensed premises, and having regard to the rights conferred on the transferee by section 1 of 18 and 19 Vic., c. 114, and the provisions for the recording of convictions on licences contained in 35 and 36 Vic., c. 94, s. 55, 37 and 38 Vic., c. 69, s. 21, and 13 and 14 Geo. V. (Northern Ireland), c. 12, s. 8, we held that we were then legally powerless to make the endorsement required by the statutes, the licence upon which it would have been necessary to endorse the particulars of conviction being temporarily in the legal custody of a person over whom we had no control.

And hereupon the judgment of the Court is required as to whether we were correct in point of law in our determination as aforesaid and as to what should be done in the premises.

Dougherty, for the prosecutor :—

It was the clear duty of the Resident Magistrates to direct that the conviction should be entered in the register of licences and also that it should be recorded on the licence. The Licensing Act, 1872, section 55, provides that (*a*) the Court before whom any licensed person is accused shall require such person to produce and deliver to the clerk of the Court the licence under which such person carries on business ; (*b*) if such person is convicted, the court shall cause the short particulars of such conviction, and the penalty imposed, to be endorsed on his licence before it is returned to the offender ; (*c*) the clerk to the licensing justices shall enter the particulars respecting such conviction, or such of them as the case may require in the register of licences.

Even although the licence itself had been transferred there was nothing to prevent the magistrates from directing that the conviction should be recorded on the licence. There was certainly nothing to prevent them from directing that the conviction should be entered in the register of licences.

Campbell, K.C. (with him *Diffin*) for the defendant: We submit that on the date of conviction a licence held by "A" in occupation could not be endorsed for an offence committed by "B," the former occupier. In the present case the premises are not now and were not when the prosecution took place in the possession of the defendant. Between the date when the offence was committed and the hearing of the case by the Resident Magistrates the defendant disposed of his public house and transferred the licence to a person named Daly. As the defendant had not the licence in his possession when the prosecution took place it was impossible for the magistrates to carry out the section of the Intoxicating Liquor Act, 1923.

MOORE, L.C.J.

MOORE, L.C.J.: I think this case is perfectly plain and I do not understand why there should have been any doubt.

His Lordship having stated the facts, continued:—By some arrangement made between them, Cosgrove transferred the licence to a man named Daly. The transfer of the licence carried with it all liabilities, including of course any defects attaching to it for which Cosgrove was responsible. The magistrates should have directed the conviction to be entered in the register of licences, and should also have directed it to be recorded on the licence. I think it would be absolutely absurd for us to come to any other conclusion.

BEST, L.J.

BEST, L.J.: I agree. The transfer from Cosgrove to Daly seems to have been perfectly *bona fide*. On 17th July the hearing of the case took place before the Resident Magistrates. They were of opinion that they should record the conviction on the licence, but that as the defendant had not the licence in his possession they were unable to do so. They should have directed the conviction to be entered in the register of licences, and should also have directed it to be recorded on the licence.

Solicitor for the prosecutor: *Chief Crown Solicitor.*
Solicitors for the defendant: *Joseph Donnelly & Co.*

J. McC.

K.B.
1930.

Dec. 12, 18.

CARR v. LONDON MIDLAND AND SCOTTISH RAILWAY COMPANY (1).

Railway—Passengers' luggage—Loss of—Liability of Company.

The plaintiff and her sister arrived at Euston Station of the defendant's railway shortly after 5 p.m. in order to travel by the 6-10 p.m. train to Heysham. Their luggage included two dressing cases which they directed a porter to put in a carriage in which they had reserved seats. The porter carried out these instructions and placed the plaintiff's dressing case on the rack of a corridor carriage which was about the middle of the train. As the porter left, the plaintiff lifted down her case and placed it on the seat. Having removed a book therefrom, the two ladies left the carriage, without closing the door, and proceeded to a bookstall on the platform about the end of the train. Upon their return seven minutes later the plaintiff's dressing case had disappeared.

Held, that in these circumstances the onus of proving that the loss was due to negligence on the part of the passenger lay upon the Company.

And *Held*, that the plaintiff, by leaving her dressing case unprotected in a carriage with the door open, was not in the circumstances guilty of such negligence as would exonerate the Company.

And *Held*, that the Company were accordingly liable for the loss.

APPEAL by the London Midland and Scottish Railway Company from a decree, granted by the Recorder of Belfast, awarding the plaintiff £14 7s. 3d. damages in respect of the loss of portion of her luggage while travelling as a passenger upon the appellants' railway.

The following statement of the facts is taken from the judgment of Andrews, L.J. :—

The plaintiff, who was accompanied by her sister, Mrs. Hume, was returning from a continental holiday. They reached Euston Railway Station, London, shortly after 5 o'clock on 27th June, 1930. Their luggage consisted of two boxes which they directed a porter to label and put in the van of the 6-10 train for Heysham, and also two dressing cases and a parcel which were to be placed in the carriage in which they had reserved seats. This carriage was about the middle of the train. All the luggage had labels bearing their own names. The porter carried out his instructions and placed the two dressing cases, one of which belonged to the plaintiff, on the rack in the carriage, whilst he deposited the parcel on the seat. Just as he left, the plaintiff lifted down her case which had the labels of three or four Swiss hotels upon it, and put it on her reserved seat in order to take a book out of it. The corridor of this carriage was on the side away from the platform and the two reserved seats were next the corridor. The ladies then left the carriage, which was otherwise empty, without closing the door behind them, and proceeded to the bookstall, which was on the platform about the end of the train, to enable Mrs. Hume to purchase a book for the journey. Porters and officials of the defendant company were on the platform which was not crowded. When the ladies returned to their carriage, after having been away for a period not exceeding seven minutes, the plaintiff's case had disappeared and was not subsequently found. Part of the time had been occupied in trying to find the carriage which the ladies did not at first recognise as theirs, owing to the plaintiff's dressing case not being in it.

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(1) In the King's Bench before Andrews, L.J.

The admitted value of the plaintiff's dressing case was £14 7s. 3d. for which amount the Recorder gave a decree.

Hume for the plaintiff and respondent :—

The delivery of a passenger's luggage to a railway company for carriage by a train in which the owner is travelling makes the company common carriers of the luggage *Vosper v. Great Western Railway Company* (1) The fact that the plaintiff moved her dressing case from the rack to the seat of the carriage does not relieve the Company from their responsibility as common carriers. In order to escape liability they must show that the loss was occasioned by the passenger's default *Le Conteur v. London and South Western Railway Company* (2).

(1) [1928] 1 K.B. 340. (2) L.R. 1 Q.B. 54.

It was held in *Bergheim v. Great Eastern Railway Company* (1) that railway companies are under no liability, if the luggage is lost or stolen without any negligence on their part, but this case has since been overruled by *Great Western Railway Company v. Bunch* (2) which is a strong authority in the plaintiff's favour.

[He also referred to *Steers v. Midland Railway Company* (3) and *Ehinger v. South Eastern and Chatham Railway* (4).]

Murphy, K.C., and *Miller* for the defendants and appellants :—

It is laid down in *Bergheim v. Great Eastern Railway Company* (1) that railway companies are not insurers of luggage and are not liable if it is lost or stolen without negligence on their part. This principle is still good law in spite of the decision in *Great Western Railway Company v. Bunch* (2) which does not expressly overrule *Bergheim's Case* (1).

The decision in *Le Conteur v. London and South Western Railway Company* (5), which is relied upon in support of the plaintiff's case, is overruled by *Talley v. Great Western Railway Company* (6).

The plaintiff took control of her dressing case in the carriage and this being so, the onus lies upon her of showing that the loss was the result of negligence on the part of the defendants. By leaving her luggage unattended in a carriage with the door open the plaintiff failed to exercise due care. Having thus contributed to the loss she is not entitled to make the Railway Company liable. *Cur. adv. vult.*

ANDREWS, L.J.

Dec. 18.

ANDREWS, L.J. : I reserved my judgment in the case as it seemed to me to raise issues of considerable public importance. At the same time I am of opinion that my decision must rest simply on the application of well settled principles to the facts which I have mentioned. The authorities have been so frequently reviewed by the Courts in England, including the House of Lords, that I feel that if this judgment is to

(1) 3 C.P.D. 221.
(2) 13 A.C. 31.
(3) 36 T.L.R. 703.
(4) 38 T.L.R. 678.
(5) L.R. 1 Q.B. 54.
(6) L.R. 6 C.P. 44.

add anything useful to what has already been said it will not be by a critical examination of the cases with their necessarily varying details, but by a short and I trust clear enunciation of the underlying principles which appear to me to govern the case.

In general, railway companies are common carriers of the passengers' personal luggage, as they are bound by statute to carry free of charge, though they are not, of course, common carriers of the passengers themselves. As such common carriers they are insurers for the safe carriage and delivery of the articles entrusted to them, subject to the well established exceptions of the loss arising from the act of God, the King's enemies, inherent vice in the article, or contributory negligence of the owner. The risk attaches from the moment of the acceptance of the luggage for carriage and continues until delivery up of same at its destination.

The absolute liability of the carrier has been modified in several cases in which the passenger has been held to exercise such personal control or dominion over his luggage as to give rise to an implied condition that instead of trusting it to the carriers he would himself take exclusive care of it ; the mere fact, however, that the owner accompanies the luggage in the carriage will not necessarily excuse the carrier, though circumstances amounting to the exclusion of the care of the carrier's servants would have this effect. The law has been handed down to us from the day of stage coaches. It was in such a case *Robinson v. Dunmore* (1) that Chambre, J., said " that if a man travel in a stage coach and take his portmanteau with him, though he has his eye upon the portmanteau yet the carrier is not absolved from his responsibility, but will be liable if the portmanteau be lost." In truth, the passenger's retention of his luggage under his own immediate control merely makes it incumbent on him to take reasonable care of it and he cannot charge the carrier with loss caused by his own negligence. The contract as common carriers or insurers is in such a case modified to this extent, but only to this extent, that it does not

(1) 2 Bos. & Pul, 416 at p. 419.

apply to loss occasioned by the passenger's own default. Cockburn, C.J., summarized the law on this point in a passage of his judgment in *Le Conteur v. London and South Western Railway Company* (1)—"I am very far," he said, "from saying that there may not in these cases sometimes be a state of circumstances in which the passenger, who has luggage which, by the terms of the contract, the company are bound to convey to the place of his destination along with him, may not excuse the company from their obligation, as carriers for the safe custody of the article by taking it into his personal custody and charge ; but I think the circumstances must be strong to relieve the company from this liability. It is not because the article that is part of the passenger's luggage to be conveyed with him is, by the joint assent or the passenger and the company, placed in a carriage with him, that the company are necessarily released from their obligation to carry safely. Nothing could be more inconvenient than that the practice of placing small articles which it is convenient to the passenger to have with him in the carriage in which he is about to ride, should be discontinued ; and if the company were, from the mere fact of articles of this description being placed in a carriage with a passenger, to be at once relieved from the obligation of safely carrying such articles, it would follow that no one who has occasion to leave the carriage temporarily would be able to have them with him with any degree of safety. I cannot think, therefore, we ought to come to any conclusion which would relieve the company under such circumstances from the obligation, as carriers, to carry the luggage safely, which, for general convenience, ought certainly to attach to them. I cannot help thinking, therefore, we ought to require very special circumstances indeed, and circumstances leading irresistibly to the conclusion that the passenger takes such personal control and charge of his luggage as to altogether give up all hold upon the company, before we can say that the company, as common carriers, would not be liable in the event of the loss."

(1) L.R. 1 Q.B. 54.

I have carefully considered the facts of the present case to see if in the language of the Chief Justice there are any "strong or very special circumstances leading irresistibly to the conclusion that the plaintiff had given up all hold on the company." I am quite unable to say that the mere transference of the case from the rack to the seat of the same carriage and the removal of a book therefrom—important instances though they no doubt are— are circumstances of such irresistible strength and cogency as to impel one to draw the conclusion referred to by the Chief Justice which would alone relieve the company from its liability. I should add that in the Law Journal report of the same case the learned Chief Justice is reported as having spoken of "the obligation (of the company) of keeping a general superintendence over articles placed in the carriages so as to prevent thieves from purloining them," and though these words are omitted or are differently phrased in the authorized report it seems to me that such a duty of providing general superintendence is necessarily incidental to the due and proper discharge of the company's legal responsibilities as insurers. It is a duty which they must exercise for their own protection. I have no evidence whatever that any attempt was made by the defendants to discharge this duty in the present case, though there should have been no insurmountable difficulty in doing so whilst the train remained stationary on the platform.

It is, however, further urged that assuming that the defendant's control was not wholly excluded, the plaintiff was guilty of negligence in leaving the luggage unprotected especially with an open carriage door and that it was this neglect on her part which caused or contributed to the loss. This alleged breach of duty on the plaintiff's part must be regarded in the light of the defendant's duty as already enunciated; for if the plaintiff was entitled to expect, as in my opinion she was, that the defendants would exercise a general superintendence over luggage in carriages, her duty in regard to the protection of her own personal luggage was, it seemed to me, not as high as it otherwise would have been. No doubt the authorities show that the owner of luggage who takes it in the carriage with him has a duty to take reasonable care of it and it may be that this duty is highest when, whilst the train is in motion the company experience greater difficulty in performing this duty of superintendence (see judgment of Willes, J., in *Talley v. Great Western Railway Company*) (1), but the defendant has not satisfied me that any act of the plaintiff in the present case was really negligent; still less have they satisfied me that it was such neglect that caused the loss. The onus of both these issues lies upon the defendant. There is no duty cast upon the passengers to remain in the carriage during the whole of the journey (per Atkin, L.J., in *Vosper v. Great Western Railway Company* (2). If it is reasonable for a passenger to leave his luggage unattended whilst he goes to a dining car or lavatory on the train why must it be negligent for him to go for a brief period to a platform bookstall? And when the left-open door is stressed by the defendant I can only say that there is not a particle of evidence to show that the thief entered the carriage through this door. It is at least equally probable that he entered and left again by the corridor door beside which the case was placed on the seat.

I am accordingly of opinion that even if it be admitted that the plaintiff had interfered in part with the defendant's exclusive control of her luggage there is no sufficient proof that any act or default of the plaintiff was contributory to the loss. For these reasons I am of opinion that whilst the case is undoubtedly a difficult one, and is decided by me, as was *Vosper's Case* (3), largely upon the onus of proof, the judgment of the learned Recorder was correct and I accordingly affirm his decree with costs.

Solicitor for the plaintiff and respondent: *J. Morris McKee.*

Solicitors for the defendants and appellants: *Macrory & Black.*

J. D. C.

(1) L.R. 6 C.P. 44, at p. 51.
(2) [1928] 1 K.B. 340 at p. 347.
(3) [1928] 1 K.B. 340.

HETHERINGTON, Appellant; HALFPENNY, Respondent (1).

K.B.D.
1931.
Feb., 10.

Licensing Law—Permitting consumption of intoxicating liquor on premises licensed only for sale of intoxicating liquor for consumption off the premises—Defendant not personally aware of, or personally concerned in the commission of the offence—Whether extenuating circumstance "in connection with the offence"—Intoxicating Liquor Act (Northern Ireland), 1923 (13 *&* 14 *Geo.* 5, *c* 12) *s.* 8 (1).

At a Court of Petty Sessions held at Belfast the respondent was convicted of the offence of permitting consumption of intoxicating liquor on her licensed premises, such premises being licensed only for the sale of intoxicating liquor for consumption off the premises. The incident complained of took place during the defendant's absence and while her son was in charge of the business. The Magistrates imposed a fine of forty shillings, but on the ground that there were extenuating circumstances connected with the offence, they did not record the conviction on the defendant's licence.

The extenuating circumstances as set out by the Magistrates in the Case Stated were as follows:—"That the defendant, during her temporary absence from Belfast, owing to ill-health, entrusted the carrying on of her licensed business to her son, and that she was not personally aware of or personally concerned in the commission of the offence and as she bears an unexceptional character, we inferrred and believed that she would not have committed the offence herself, had she been present, nor have allowed anyone else to commit it."

Held, that these matters were not extenuating circumstances in connection with the offence, within the meaning of section 8, sub-sec. 2 of the Intoxicating Liquor Act (Northern Ireland), 1928, and accordingly that the conviction must be recorded on the defendant's licence.

CASE STATED under 20 & 21 Vic., c. 43, by Justices of the City of Belfast.

At a Court of Petty Sessions at Belfast on the 23rd day of October, 1930, before Mr. H. Toppin, and Mr. P. J. O'Donoghue, Resident Magistrates and Justices of the Peace, the respondent, Elizabeth Halfpenny, was charged on a summons at the suit of the appellant, a head-constable in the Royal Ulster Constabulary, that she on the 13th day of September, 1930, did permit the consumption of intoxicating liquor on her licensed premises, situate at 72 Seaforde Street, Belfast, such premises being licensed only for the sale of intoxicating liquor by retail for consumption off the premises, contrary to the statute

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(1) In the Divisional Court before Moore, L.C.J., and Brown, J.

The following facts appeared from the Case Stated :—

" During permitted hours, that is to say, at 9-5 p.m., on Saturday, 13th September, 1930, Sergeant John Connolly, Royal Ulster Constabulary, entered the defendant's premises which are licensed only for the sale of intoxicating liquor by retail for consumption off the premises. The sergeant saw the licensee's son, J. Halfpenny, who is 27 years of age, standing behind the counter, and at the counter was another man and on the counter opposite him was a glass of porter.

Mr. Campbell, K.C., Counsel for the defendant, admitted that the defendant had permitted consumption.

The defendant is a widow. She is sixty-four years of age. She has been twenty-nine years the licensee of these licensed premises. She has never been convicted of any offence. At the time of the offence under consideration she was staying in the country near Portadown to recruit her health which had become impaired. She had been there for a fortnight and she returned three days later. She manages the licensed business herself ; it does not permit of her employing a barman. Her son, above referred to, is a motor car driver, and does not ordinarily take part in the conduct of the licensed business, but during her absence she left him in charge, warning him to be very careful. She was surprised and sorry when she found he had committed this offence.

Mr. Campbell, K.C., asked us not to record the conviction but to hold that extenuating circumstances existed in connection with this offence in so far that the defendant was not personally aware or personally concerned in the commission of the offence being absent temporarily from Belfast owing to ill-health ; that she had warned her son, and that it was reasonable to believe, owing to her previous unexceptionable record, that had she been present she would neither have committed this offence herself nor have allowed anyone else to commit it on her premises.

We read in Court for the information of the complainant and of the defendant and her Counsel the order made by the learned Recorder of Belfast on an appeal, and not challenged by the Crown, from our order in the recent cases of James Doherty, in which we had directed the conviction to be recorded on his licences. The Recorder's order was certified to us as follows :—'I certify that upon the hearing of the said appeal on the 8th day of September, 1930, the Recorder confirmed the said conviction and order of penalty, and further, being of opinion that extenuating circumstances existed in connection with the offence in so far that the appellant was not personally aware or personally concerned in the commission of the offence, and thereupon the Recorder directed that the conviction be not recorded on the appellant's licence.'

We were of opinion that we ought to attach great weight to the learned Recorder's decisions, referred to above, as indicating what might in law constitute extenuating circumstances in connection with the offence, and that even assuming that he was wrong in his decisions in those cases there were special facts in the present case which seemed to us to make it clear that there should be no endorsement.

We found as a fact that the defendant during her temporary absence from Belfast owing to ill-health entrusted the carrying on of her licensed business to her son, and that she was not personally aware of or personally concerned in the commission of the offence, and as she bears an unexceptionable character we inferred and believed that she would not have committed the offence herself had she been present, nor have allowed anyone else to commit it. We were thereupon satisfied that there were extenuating circumstances connected with the offence, and that by reason of them the conviction ought not to be recorded."

The present case was stated upon the application of the complainant in the summons, the judgment of the Court being required as to whether the magistrates were correct in point of law in deciding that the circumstances relied upon by the defendant were extenuating circumstances in connection with the offence, within the meaning of section 8, sub-s. 1 of the Intoxicating Liquor Act (Northern Ireland), 1923.

Dougherty (with him *Babington, K.C., Attorney-General*) for the appellant :—

The circumstances which the Magistrates have treated as extenuating circumstances were not in any way connected with the offence and accordingly the Magistrates were not entitled to take them into consideration. *Rex* (*Wright*) *v. County Court Judge of Tyrone* (1).

[He also referred to *Commissioners of Police v. Cartman* (2).]

T. J. Campbell, K.C., and *Diffin* for the respondent :

The section provides that the circumstances must be extenuating circumstances " in connection with the offence " but this does not necessarily mean in connection with the commission of the offence.

Some of the circumstances set out by the Magistrates in the Case Stated are sufficiently connected with the offence to justify their being properly taken into consideration.

[They referred to *Conlon v. Muldowney* (3), *Somerset v. Wade* (4), *Emary v. Nolloth* (5), and *Adams v. Camfoni* (6).]

The Attorney General was not called upon to reply.

MOORE, L.C.J.

MOORE, L.C.J. : delivered the judgment of the Court.

The Magistrates were in a difficult position with regard to this prosecution, as in two previous similar cases in which they had endorsed convictions on the licences, appeals were taken and their decisions in that regard were reversed by the learned Recorder of Belfast, who held that lack of personal knowledge of the offence on the part of the traverser constituted extenuating circumstances. Accordingly, in this case they followed the learned Recorder's decisions, and did not record the conviction on the ground that there were extenuating circumstances, particulars of which they have set out in the Case Stated. We think, however, that if the Recorder in these two cases had considered the decision of this Court in *Rex* (*Wright*) *v. County Court Judge of Tyrone* (1), he would have come to the conclusion that he must record the conviction on the defendant's licences. The Act of Parliament provides that the extenuating circumstances must be "in connection with the offence." The circumstances relied upon by the defendant in the present case are all directed to show that, owing to absence and ill-health and misplaced confidence in her son, the appellant had in fact nothing to say to the offence in regard to which she has pleaded guilty.

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(1) [1930] N.I. 182.
(2) [1896] 1 K.B. 655.
(3) [1904] 2 I.R. 498.
(4) [1894] 1 Q.B. 574.
(5) [1903] 2 K.B. 264.
(6) [1929] 1 K.B. 95.

If the extenuating circumstances are that she is in no way responsible for the offence, it is obvious that they can not be connected with it, which is the only form of extenuating circumstance taken into consideration by the statute.

We think it is a clear case and the appeal by way of Case Stated should be allowed.

As the Crown do not ask for costs, we say nothing about them.

Solicitor for the appellant : *The Chief Crown Solicitor.*
Solicitors for the respondent : *Joseph Donnelly & Co.*

J.D.C.

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(1) [1930] N.I. 182.

C.A.
1930.

Nov. 10.

THE ARMAGH DIOCESAN BOARD OF EDUCATION, EDWARD FITZHARDINGE CAMPBELL AND HENRY E. HARDY v. HENRY MITCHELL (1).

Teacher's residence—Occupier in possession as principal teacher of school—Closing of school—New Public Elementary School built—Teacher appointed principal teacher of new school continuing to occupy the teacher's residence—Civil Bill Ejectment on the title to recover possession—Education Act (Northern Ireland), **1923 (13 *&* 14 *Geo.* 5, *c.* 21) *ss.* 11, 14 (9).**

On 25th May, 1889, certain lands were conveyed to the Rev. E. F. C., rector, and his successors, rectors of the parish of K. The Rev. E. F. C. as rector was manager of the K. National School. The lands adjoined the school and a residence was erected thereon for the principal teacher of the school, partly out of money lent by the Commissioners of Public Works in Ireland and partly out of parish funds. The loan was made repayable by an annual charge of £10, and secured by a Charging Order and by a Bond for the sum of £250, conditioned for the repayment of the loan and further conditioned " that so long as the school for which the residence has been provided continues to be recognised as a National School, while at the same time any money remains due to the Board on foot of the loan, the dwelling house and other premises shall be used exclusively as the place of residence for the Teacher of the National School and for no other purpose whatsoever."

By a Scheme framed by the Judicial Commissioners constituted under the Educational Endowments (Ireland) Act, 1885, and approved by Order in Council, dated 8th March, 1892, the A. Diocesan Board of Education was constituted a body corporate with the power to acquire and hold property real and personal for the purposes of the Scheme, and certain endowments including the Schoolhouse and teacher's residence of the K. National School were vested in it, and the trusts upon which the endowments were to be held were declared by the Scheme, and *inter alia* it was provided that the Diocesan Board with the consent of the local school authority might discontinue any Elementary School or Schools, and that upon any such discontinuance the vacated buildings might be appropriated for such of the purposes of the Scheme as the Board should deem expedient, or might be let, sold or otherwise disposed of, and it was further provided that whenever any elementary school should in the opinion of the Board have ceased to be in efficient operation, the Board might dispose of the site, buildings, and other endowments.

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(1) In the Court of Appeal before Moore, L.C.J., Andrews and Best, L.JJ.

The Rev. E. F. C. resigned the rectorship of the parish and the managership of the school, and the Rev. H. E. H. was appointed in his stead as rector and manager. On the 29th April, 1924, the Rev. H. E. H. appointed the defendant as principal teacher of the school and the defendant was thereupon put into possession of the teacher's residence, and signed a caretaker's agreement in the prescribed form.

The last instalment of the loan was repaid on the 20th June, 1925, and the defendant paid one-half of each half-yearly instalment from the date of his appointment but never paid any rent for the teacher's residence.

Upon the passing of the Education Act (Northern Ireland), 1923, the K. National School continued to be carried on as a voluntary school under the management of Rev. H. E. H., until its closing and discontinuance on 20th December, 1929; the school was never transferred to the Education Authority.

The Education Authority built a new provided school about 200 yards from the site of the old school and opened there on 1st January, 1930, the K. Public Elementary School, of which the defendant was appointed principal teacher, the pupils attending the new school, being mainly those who had been attending the K. National School.

The defendant continued in occupation of the teacher's residence notwithstanding a demand for possession, claiming to be entitled to possession without paying any rent so long as he remained principal teacher of the new Public Elementary School.

The plaintiffs obtained from the County Court Judge of T., a decree for possession. The defendant appealed to the Judge of Assize who stated a case for the opinion of the Court of Appeal.

Held, by the Court of Appeal (Moore, L.C.J., Andrews and Best, L.JJ.) that the old school having ceased to exist, the defendants contract of employment had been terminated, and the plaintiffs were entitled to a decree for possession.

CASE STATED by Brown, J., for the opinion of His Majesty's Court of Appeal in Northern Ireland, at the County of Tyrone Summer Assizes, 1930, on the hearing of a civil bill ejectment on the title, on appeal from a decree by the County Court Judge as follows:—

"This case came before me sitting as Judge of Assize to hear civil bill appeals at the Summer Assizes, 1930, at Omagh for the County of Tyrone, on an appeal by the defendant from a decree by the County Court Judge for said County upon a civil bill ejectment on the title to recover possession of part of the lands of Kinnego containing one rood and twenty perches with "the dwelling house and building thereon situate in the Barony of Dungannon Middle and in the Division of Dungannon and County of Tyrone.

Mr. J. C. Davison, K.C. (instructed by Monroe & Anderson, Solicitors) appeared for plaintiffs, and Mr. Maginess (instructed by T. D. Gibson, Solicitor) appeared for the defendant.

The following facts and documents were proved in evidence before me or admitted by the parties:—

By Indenture of Conveyance, dated 25th May, 1889, and made between William McIlroy of the first part, Thomas Cross of the second part, Jane Cross of the third part, and the Reverend Edward Fitzhardinge Campbell (one of the above-named plaintiffs) of the fourth part, in consideration of twenty-five pounds fifteen shillings, one rood and twenty perches of the lands of Kinnego, in the County of Tyrone (being the lands described in the ejectment civil bill herein, and being portion of the lands comprised in an Indenture of Fee Farm Grant, dated 30th July, 1860, and made between Colonel the Hon. William Stuart Knox of the one part and Thomas Cross of the other part) were conveyed to the said Rev. E. F. Campbell, to hold unto the said E. F. Campbell and his successors rectors for the time being of the parish of Killyman, in the said County of Tyrone for ever, absolutely discharged from the legacy and mortgage therein mentioned and from all rents reserved by the said Indenture of Fee Farm Grant.

At the time of the said Conveyance the said Rev. E. F. Campbell was the Church of Ireland rector of the parish of Killyman, in the County of Tyrone, and as such rector was the manager of a National School in the townland of Laghey adjoining the parish church, and recognised by the Commissioners of National Education in Ireland, and the said plot of one rood and twenty perches so purchased by him as aforesaid adjoined the schoolhouse in which said National School was carried on, and a dwelling house was erected upon the said plot which has ever since been used as a residence for the principal teacher of the said school.

"Said dwelling house was built mainly out of two hundred pounds, moneys lent by the Commissioners of Public Works in Ireland, but the cost of acquisition of the said plot and the remainder of the funds necessary for the completion of the said building and the fitting out and equipment of same were provided by the said Rev. E. F. Campbell as rector of the said parish out of parish funds.

The said loan of two hundred pounds was made repayable by an annual rent-charge of ten pounds payable by equal half-yearly payments during the term of thirty-five years computed from the 5th day of December, 1889, and the repayment thereof was secured by a charging order of said last mentioned date, charging same upon the said plot, and by a bond of even date executed by the said Rev. E. F. Campbell and Francis Greer, Richard Robinson and John Burleigh Robinson, to the said Commissioners of Public Works (therein called the Board) for the sum of two hundred and fifty pounds conditioned for the repayment of the said loan by instalments as aforesaid and further conditioned 'that so long as the school for which the residence has been provided continues to be recognised as a National School, while at the same time any money remains due to the said Board on foot of the said loan the said dwelling house and other premises aforesaid shall be used exclusively as the place of residence for the teacher of the National School aforesaid and for no other purposes whatsoever.'

By a Scheme framed by the Judicial Commissioners constituted under the Educational Endowments (Ireland) Act, 1885, and finally approved by order in Council, dated 8th March, 1892, the Armagh Diocesan Board of Education, one of the above-named plaintiffs, was constituted a body corporate with perpetual succession and a common seal and power to acquire and hold property real and personal for the purposes of the scheme, and the endowments mentioned in the schedule to the said scheme (including the said school house and teacher's residence of the Killyman National School) were vested in the Armagh Diocesan Board of Education and the trusts upon which the "said endowments were to be held were declared by the said scheme, and *inter alia* it was provided that subject as to the National Schools to the rules and regulations applicable thereto, the said Diocesan Board, with the consent of the local school authorities concerned, might discontinue any elementary school or schools and that upon any such discontinuance the vacated buildings and premises might be appropriated for such of the purposes of the scheme as the Board should deem expedient, or might be let, sold or otherwise disposed of, and it was further provided that whenever any elementary school should, in the opinion of the Board, have ceased to be in efficient operation the Board might dispose of the site, buildings and other endowments thereof and might apply the same or the produce thereof for such of the purposes of the scheme as they should think fit.

The said Rev. E. F. Campbell resigned the rectorship of the said parish and the managership of the said school, and upon his resignation the said Rev. H. E. Hardy was appointed rector of the said parish and manager of the said school, and as such manager by agreement, dated 29th April, 1924, the said Rev. H. E. Hardy appointed the defendant as principal teacher of the said school upon the terms therein mentioned.

Upon his appointment as such teacher the defendant was put into possession of the said dwelling house erected upon the said plot, and the defendant proved that he signed a caretaker's agreement in respect thereof in the form set forth in the schedule to the rules and regulations of the Commissioners of National Education in Ireland, dated May, 1915; the original caretaker's agreement cannot be found and is not forthcoming.

The last instalment of the said loan was repaid on the 20th June, 1925, and from the date of his appointment as such teacher until said loan was paid off (being two or three half-yearly instalments) the defendant paid one-half of the said instalment, the other half being paid by the Ministry of Education for Northern Ireland as successors to the Commissioners "of National Education in Ireland, who also paid said half-yearly instalments.

From the time of the defendant's appointment as such teacher over seventy pounds was spent by the manager, the Rev. H. E. Hardy, out of the parish funds in repairs to the said dwelling house, and any repairs which the defendant asked to be done were carried out by the manager, but the defendant had carried out some minor repairs at his own expense without making any request to the said manager. The defendant has never paid any rent for the said premises.

Upon the passing of the Education Act (Northern Ireland), 1923, the said Killyman National School continued to be carried on as a voluntary school under the management of said Rev. H. E. Hardy until its closing and discontinuance on the 20th December, 1929, when the contract of employment between the said Rev. H. E. Hardy came to an end, and the said school was never transferred to the Education Authority, being the County Council of the County of Tyrone acting through their Regional Committee.

The said Education Authority built a new provided school about two hundred yards from the site of said old school and opened therein on the 1st January, 1930, a public elementary school, known as Killyman Public Elementary School, of which the defendant was appointed principal teacher, the pupils attending the said new school being mainly those who had been attending the old school.

The said Rev. H. E. Hardy has not been appointed a member of the committee of management thereof, and same is independent of the said Rev. H. E. Hardy and the Diocesan Board of Education and is entirely managed and controlled by the said Education Authority.

The Rev. H. E. Hardy proved that the new school served exactly the same area as the old school, that all the same teachers teach in the new school who taught in the old school, and that the same children are taught in the new school who were taught in the old school.

"The defendant proved that he signed no new agreement until after he had continued as teacher in said school for three or four months.

The defendant continued in occupation of the dwelling house and premises and a demand for possession on behalf of the said Armagh Diocesan Board of Education, dated 5th May, 1930, was served upon the defendant on the 6th day of May, 1930, and a further demand for possession of same on behalf of the Rev. E. F. Campbell and the Rev. H. E. Hardy, dated 17th May, 1930, was served upon the defendant on the 19th day of May, 1930, but the defendant refused and still refuses to deliver up possession of same, and claims to be entitled to possession of same without paying any rent therefor so long as he remains principal teacher of the new public elementary school.

The defendant has never claimed and does not now claim any title to the residence other than as set out in the last paragraph.

In the course of argument, in addition to the documents above mentioned, I was referred to the rules and regulations of the Commissioners of Education in Ireland, the Government of Ireland Act, 1920, the Education Act (Northern Ireland), 1923, and the Education Act (Northern Ireland), 1930.

It was also proved in evidence that the old Killyman National Schoolhouse was used for Sunday school, church meetings and other church purposes, and that denominational religious instruction was given in the said school.

At the beginning of the plaintiff's case I was asked by Mr. Davison if I formed an opinion against plaintiffs, to state a case; during Mr. Maginess's argument I asked him if he were willing to take a case stated, and he replied he would.

The question for the opinion of the Court is whether, upon the facts stated above, the plaintiffs or any of them are entitled to a decree for possession of the said dwelling house and premises.

If this question be answered in the affirmative, the decree of the said County Court Judge is to be affirmed "with £3 17s. 9d. costs in the civil bill Court and ten shillings witnesses' expenses, and £6 19s. 3d. costs of appeal and five shillings witnesses' expenses.

If the said question be answered in the negative, the said decree is to be reversed and said ejectment bill dismissed with £3 8s. 6d. costs in the civil bill Court and five shillings witness's expenses, and £7 13s. 9d. costs of appeal and five shillings witness's expenses."

Davison, K.C., and *Warnock* for the plaintiffs :—

The teacher here, has no concern with the title nor with the trusts on which the property is held. The defendant was never asked for and never paid any rent. There was no tenancy. The manager spent over £70 in repairs to the teacher's residence. A new school having been erected by the regional committee, the old school was absolutely discontinued.

It is a mere accident that the principal teacher in the new school was also principal teacher in the old school, and that this school is in the same neighbourhood. There was no transfer of the old school. There was no contractual relationship between the Commissioners of National Education and the defendant.

The old school was essentially a Church of Ireland school, and that school is closed and discontinued. The new school is absolutely undenominational, otherwise it would be unlawful under the Government of Ireland Act, 1920. Neither the rector nor the Diocesan Board have anything to do with the new school.

Section 11 of the Education Act (Northern Ireland), 1930, provides for the provision and maintaining of a teacher's residence and for its transfer to an education authority.

There is no continuity between the old school and the new school.

Section 14 (9) of the Education Act (Northern Ireland), 1923, deals entirely with and only applies to, the transfer of schools. Indeed if the section were not limited in that way it would be *ultra vires* the Parliament of Northern Ireland. (See section 5 (1) of the Government of Ireland Act, 1920). We submit that section 14 (9) only applies to transferred schools and transferred property, it is not retrospective. This section cannot have the effect of continuing the defendant in the teacher's residence attached to the old school.

The defendant was put in possession of the teacher's residence under a caretaker's agreement and for a purpose which has ceased to exist.

The only case that we have been able to find which even remotely resembles the present case is *Rex* (*Walsh*) *v. Swifte* (1). The defendant was put in possession of the teacher's residence expressly as teacher of Killyman National School. He now claims to remain in possession although his old employment has been determined. This dwelling house is Church property and could not be taken away from the plaintiffs even by an Act of Parliament of Northern Ireland.

We submit that the plaintiffs are entitled to possession.

Babington, K.C. (*Attorney-General*) and *Maginess* for the defendant:—

The defendant relies on the caretaker's agreement. It is plain that he was put in possession of the teacher's residence as part of his teaching contract in connection with the Killyman National School.

We contend that the present school and the old school are the same. It is true that the present school is managed under different conditions, and the fabric is different. When the old school was built, it was impressed with a trust that the principal teacher should occupy the teacher's residence so long as he remained principal teacher of the Killyman school. The expression "school" as used in the Education Acts covers more than the actual building in which education was carried on, it also includes the pupils in attendance. We submit that from the point of view of the public, this is the same school.

There were restrictions as to what use could be made of such schools as the Killyman National School, they could not, for instance, be used for political meetings. The teacher's residence ought to be treated as being in the same position, as if the school had been transferred.

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(1) [1913] 2 I.R. 113.

The agreement is not an ordinary caretaker's agreement, it is rather an agreement to endure during the defendant's service as teacher.

By section 3 (2) (*b*) the Legislature has recognised that the rights of those persons who were formerly managers of public elementary schools are to be protected, we submit that the same trusts attach to the teacher's residence as formerly. Section 14 (9) of the Education Act (Northern Ireland), 1932, applies not only to transferred schools but to non-transferred teachers' residences. At the present moment the Rev. H. E. Hardy's position is substantially the same as when he was manager of the school. He has still control of the school, through his representatives.

MOORE, L.C.J.

Moore, L.C.J. (Having stated the facts, continued as follows):—

The loan made by the Commissioners of Public Works in Ireland was paid off in 1925.

The defendant's contract of employment could be terminated in two ways, in addition to his resignation, either (*a*) by the giving of three months' notice, or (*b*) by the school itself coming to an end. If the school has come to an end then the tenure of the defendant has also come to an end. The old school has in my judgment come to an end. There has been a change of ownership, the continuity of the school is broken, and there has been a change in management. The old school has ceased to exist.

The plaintiffs are entitled to a decree for possession.

ANDREWS, L.J.

ANDREWS, L.J.: I have not much to add. No question has been raised as to plaintiffs' title. Under a caretaker's agreement of 3rd December, 1924, the defendant was put into possession of the premises in his capacity as teacher of the Killyman National School to be taken care of by him, so long only as he should lawfully continue to be such teacher, and he expressly undertook that he would deliver up free and undis-

ANDREWS, L.J.

turbed possession of the premises to the Reverend H. E. Hardy, or other the manager for the time being of the said school, whenever he should cease to be such teacher and caretaker. The defendant has therefore no right to retain possession unless the new school of which he is teacher is in reality the same school as the old one, and may properly be described as "The Killyman National School." The question as to whether the present school is or is not a new and different school from the old one is a mixed question of law and fact. Different tests might be applied. The situation of the school and the personnel of the scholars are important considerations in this connection; but in my opinion the two matters that have most bearing on the point are that the management of the new school is quite distinct from that of the old school, and so is the ownership. The old school was vested in the Armagh Diocesan Board of Education; and the rector for the time being of the parish of Killyman was its manager. The new building is vested in and managed by the County Council of Tyrone, which, acting through their Regional Committee, is the Education Authority under the Education Act (Northern Ireland), 1923.

The defendant's rights under the caretaker's agreement are, in my opinion, absolutely gone, and there must be a decree for possession.

BEST, L.J.

BEST, L.J.: I concur with the judgments which have just been delivered.

Solicitors for the plaintiffs, *Monroe & Anderson.*
Solicitor for the defendant, *T. D. Gibson.*

J. McC.

ESTATE OF SHEILA FRANCES MAGENIS AND OTHERS (1).

Jud. Commr. 1930.

Dec. 9.

(N. I. 1066).

Land Purchase—Vendor's rights over holdings immediately prior to vesting—Application to determine claim in respect of such rights—Form of order on such application—Northern Ireland Land Act, 1929 (19 *Geo.* 5, *c.* 14), *s.* 4.

Form of order made on application under section 4 of the Northern Ireland Land Act, 1929.

Motion brought by Sheila Frances Magenis and others under section 4 of the Northern Ireland Land Act, 1929, for an order determining their claims, as vendors, in respect of certain holdings on the estate, over which they claimed to have been entitled to rights of turbary immediately prior to the date of the vesting of the lands in the Land Purchase Commission.

Monroe, K.C., and *Chambers* for the vendors.
Beattie, K.C., for nine tenants.
Davison, K.C., for twenty-eight tenants.

The curial portion of the order made was as follows :

"The Court doth declare, pursuant to the provisions of section 4 of the Northern Ireland Land Act, 1929, that immediately before the date of the vesting of the said several holdings referred to in the second schedule hereto, the vendors were entitled to rights over the said holdings or that they had, immediately before that date, power to exercise acts of ownership or enjoyment in respect of the said holdings which if enjoyed by any person other than the vendors would have been a profit à prendre such rights or power being in respect of turbary. And the Court doth further declare that the said rights or power were, on the 28th

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(1) In the Court of the Land Purchase Commission before Megaw, K.C., Judicial Commissioner.

"day of May, 1925, of substantial value. And the Court doth accordingly declare that the said several holdings referred to in the said second schedule hereto are subject to the said rights or power in accordance with the provisions of the said section 4 sub-s. 1 of the Northern Ireland Land Act, 1929. And the Court doth further declare that in this case the reasonable period referred to in the sub-s. 1 (ii) of the said section 4 is 40 years from the date of the vesting of the said holdings in the said Commission, *viz.*, the 27th day of May, 1929; and all parties so consenting, the Court doth direct that the said Commission be at liberty to make regulations with respect to turbary in pursuance of the provisions of the Land Purchase Acts, so as to define the respective areas on which the proprietors of the said several holdings referred to in the said second schedule hereto are to cut turf having regard to the above declaration. And it is further declared that the vendors have agreed in Court to observe the terms of their draft undertaking referred to in the first schedule hereto a copy of which is set out in the fourth schedule hereto. And the Court doth further direct that each party shall abide his own costs."

SCHEDULES.

The first schedule to the order contained particulars of the documents referred to; the second and third schedules contained the names of the tenants concerned, and particulars of their respective holdings; the fourth schedule contained the terms of an undertaking by the vendors as to the procedure which they agreed to observe in connection with the annual lettings of the turbary.

Solicitors for the vendors: *Barrington & Son.*
Solicitor for the first group of tenants: *John Taylor.*
Solicitor for the second group of tenants: *J. W. Pinkerton.*

J. D. C.

McCORD v. SPROAT (1).

C.A.
1931.
Jan. 19, 27.

Trade Union—Rules—Meaning of expression, "not practically working at trade of lithographic printer"—Manager of a company embracing a number of trades, including a lithographic printing department—Whether within such description—Superannuation.

The plaintiff was a member of the Amalgamated Society of Lithographic Printers. Having attained the age of sixty years, he was entitled, under the rules of this Society, to receive superannuation benefit, provided that he had ceased to follow any employment connected with the trade of lithographic printing, or provided that he was "not practically working at the trade or under the rules of the Society." The plaintiff, having been employed for twenty-five years by a company of wholesale stationers as foreman of their lithographic department, was promoted to the position of general manager of their entire business. In this capacity he supervised all their departments, including the lithographic department. The Society contended that he was still working at the trade of a lithographic printer.

Held, by the Court of Appeal (Andrews, L.J., dissenting) that the plaintiff had ceased to follow any employment connected with the trade, and was not practically working at the trade, within the meaning of the rules of the Society, and that he was accordingly entitled to superannuation benefit.

Judgment of Wilson, J., affirmed.

APPEAL from an order of WILSON, J., made on the hearing of an originating summons brought to determine the plaintiff's right to superannuation benefit under the rules of the Amalgamated Society of Lithographic Printers and Auxiliaries of Great Britain and Ireland.

(The rules material to this report were as follows :—

1. The Society shall consist of members working at lithographic, collotype, copper-plate, intaglio, and other metallic printing, and colour-mixing for same, who shall have served the period of apprenticeship laid down by these rules or otherwise recognized by the Society ; and further of members working at stone or plate-preparing or men partially em-

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(1) In the Court of Appeal before Moore, L.C.J., and Andrews and Best, L.JJ. (The case had previously been argued before Andrews and Best, L.JJ., but their Lordships directed it to be re-argued before a full Court).

ployed at stone or plate-preparing, for any or all of the foregoing processes.

24.—(1) Any member who has been twenty years successively in the adult section of the Society, and who, through old age, infirmity, or incurable disease, is unable to obtain employment at the trade, and applies for superannuation benefit, shall state his claim to the branch of which he is a member . . . .

(2) Any member on attaining the age of sixty, having been in the Society thirty years successively, and desirous of claiming superannuation, may do so irrespective of the state of his health.

(7) Any member having accepted the benefit of this rule shall not be allowed to work again at the trade unless a doctor certifies him as fit. . . . .

(9) He shall be entitled to superannuation benefit irrespective of any income he may receive from private means, or from any other trade or calling not connected with the Society, and no inquiry shall be made with reference to a member's private income. . . .

36.—(9) Any overseer or foreman charged with wantonly harassing the men working under him shall . . . be liable to a fine. . . .

45.—(1) Any member following any employment not connected with the trade—that is, not practically working at the trade and under the rules of the Society—for a period of six months, and wishing to remain a member, can do so, providing that he does not infringe the rules of any other Society. He shall pay one shilling and ninepence per week as contributions, and fourpence to superannuation fund but shall be exempt from all levies, and shall be eligible for sick, superannuation and funeral benefit only.

(2) Members wishing to avail themselves of this rule must immediately upon leaving the trade inform the secretary of the branch, and failing to do so shall be fined the sum of five shillings.

46.—(1) Any member of this Society commencing business at the trade on his own account, and desiring to remain a member can do so by the payment of the usual subscription and levies imposed under the provisions of rule 28, and shall be entitled to sick, superannuation and funeral benefits.

(2) In the event of his returning to work as a journeyman, he shall, on application to the branch secretary . . . be reinstated and be eligible for all benefits as though he had remained a journeyman uninterruptedly; but in no case shall such member be allowed to take office during the time he remains an employer.

54.—(1) No member of this Society shall work in any shop where there is also employed a non-union . . . printer eligible for membership of this Society. This rule shall apply whether they be foremen or journeymen.

57.—(7) Only members of the craft to be permitted to supervise litho departments or sign proofs, except where a member of the firm, or manager be appointed to do so.

The plaintiff, David McCord, was born on 4th April, 1865. He became an indentured apprentice to a firm of lithographic printers in Belfast for the purpose of learning the trade of lithographic printing and his apprenticeship expired on 30th April, 1884. He had become a member of the Society in October, 1883, and had remained a member and paid all contributions payable in respect of such membership up to the date of the proceedings. From April, 1898, to May, 1923, the plaintiff was employed by Messrs. Little & McClean, Limited, Church Lane, Belfast, as foreman of their lithographic department, and in May, 1923, he was appointed general manager of the entire business of that company and continued in that position. Prior to and since 1923 Messrs. Little & McClean carried on the trades and businesses of wholesale and manufacturing stationers, wholesale paper merchants, letterpress printers and stereotypers, lithographic printers, bookbinders and die stampers, embossers, card board box makers and paper bag makers, with other trades ancillary to the above. The plaintiff, as general manager of the business of the company, had control and supervision of the carrying on by the company of all the above-mentioned trades, and of the managers of the several departments of the said business. There was a separate manager of the lithographic printing department. The number of persons employed in this latter department was about fifteen, some of whom performed work which was purely lithographic whilst others performed operations ancillary to and dependent on lithographic work, such as cutting, varnishing, gumming, gluing, folding cardboard, box making and packing. The total number of persons in the employment of Messrs. Little & McClean was about one hundred.

The plaintiff applied to the Belfast branch of the Society for superannuation benefit in 1923 and subsequently, but the executive committee of the Society contended that, under the rules, he was not entitled to superannuation benefit being ineligible therefor by reason of the fact that "he is still acting in a managerial capacity for a firm employing our members as lithographic printers."

Upon the hearing of the summons Wilson, J., held that the general management of a company carrying on such business as was carried on by Messrs. Little & McClean was not "work at the trade" or "a trade or calling connected with the Society" within the meaning of the rules and that the plaintiff was accordingly entitled to the superannuation benefit claimed, subject to the Society having funds properly applicable thereto.

The defendant applied to have this order in chambers made up as a court order and appealed therefrom to the Court of Appeal.

Murphy, K.C., and *Porter*, for the appellant :—

The plaintiff must bring himself within the provisions of rule 45 by showing that he is not following any employment connected with the trade. This is defined in the same rule as "not practically working at the trade and under the rules of the Society. "Practically" in this rule does not necessarily mean manually. It cannot be contended that a man who has risen to the position of manager of Messrs. Little & McClean is not practically working at the trade of a lithographic printer.

Black, K.C., and *Ellison*, for the respondent :—

This Society is a union of handicraftsmen ; its rules enable journeymen and apprentices to become members but there is no provision for the admission of managers.

If a person who had no previous connection with the Society had been appointed manager of Messrs. Little & McClean, no one would suggest that he was practically working at the trade of a lithographic printer, simply because the lithographic department was one of those under his control.

If the appellant's submissions were sustained it would follow that a journeyman in one of the numerous trades connected with shipbuilding who rose to the position of manager of a large shipyard, would still be practically working at his original trade, a proposition for which no one would contend.

Cur. adv. vult.

Moore, L.C.J.: The plaintiff, David McCord, a member of the Amalgamated Society of Lithographic Printers and Auxiliaries thereto of Great Britain and Ireland, caused an originating summons to be brought before Mr. Justice Wilson to raise the question of his right to superannuation benefit under the rules of the Society.

I do not propose to set out all the questions and answers, because I consider that the case is ruled by the findings of the learned Judge in answer to 2 (*a*) and 2 (*b*), viz.:—

> Is the general management of the entire business of a company registered under the Companies Acts carrying on business as wholesale and manufacturing stationers, wholesale paper merchants, letterpress printers and stereotypers, lithographic printers, bookbinders and die stampers, embossers, card board box makers and paper bag makers and having a manager of their lithographic department only—
>
> (*a*) "work at the trade"? Answer: "No."
>
> (*b*) a "trade or calling not connected with the Society"? Answer: "Yes."

and accordingly the learned Judge, in answer to question 4 (*b*), found that the plaintiff was entitled to the superannuation benefit claimed subject to the Society having funds properly applicable thereto.

The defendant applied to have the order in chambers made up as a court order, which was done, and from that the present appeal has been brought.

The defendant represents a voluntary association and the plaintiff's rights are necessarily to be determined by the rules and provisions in the constitution of that association of which he is also a member. In the course of the argument Counsel have referred us to a great many of these regulations and conditions rather in most cases to show the objects of the Society than as having a direct bearing on the present case, and I intend for the purpose of this judgment only to refer to those which have such a bearing.

It is obvious from the title that the Society is a Lithographic Society and its members are limited to those following several trades and occupations which are included in rule 1, as follows :—" The Society shall consist of members working at lithographic, collotype, copper-plate, intaglio, and other metallic printing—and colour-mixing for same—who shall have served the period of apprenticeship laid down by these rules, or otherwise recognised by the Society ; and, further, of members working at stone or plate-preparing, or men partially employed at stone or plate-preparing, for any or all of the foregoing processes," and when subsequently in the rules and regulations such words as " member," " trade," " employment," " calling," " work," and " working " occur, they must always be connoted with the foregoing.

The next rule to which I wish to refer is rule 24, dealing with superannuation. The whole of clause 1, as well as the earlier parts of clause 2, deal with superannuation benefit in those cases where the member " through old age, infirmity, or incurable disease " is unable to work.

The concluding portion, however, of clause 2 extends this privilege of claiming superannuation to any member on attaining sixty years of age, who shall have been for thirty years a member of the Society, irrespective of health conditions. In the present appeal it is admitted that the plaintiff comes within this rule so far as his own age and the length of his membership of the Society are concerned.

Accordingly, on the 1st of June, 1925, he applied for superannuation benefit. It is not necessary to go into prior correspondence. On June the 22nd he received a reply on behalf of the Society saying " this member is still working at the trade in the capacity of manager for a litho. department." On June the 30th plaintiff wrote back to say that he was not manager of a litho. department but general manager of the whole business of Messrs. Little & McClean. This is a general stationery business of which the litho. department in its number of employees may be taken as about fifteen per cent. This is the business described in Question 2 of the originating summons as " Wholesale and manufacturing stationers, wholesale paper merchants, letterpress printers and stereotypers, lithographic printers, "bookbinders and die stampers, embossers, card board box makers and paper bag makers," and which Mr. Justice Wilson must have found to exist as such by answering that question without varying its terms either in the question or in the answer.

The grounds on which the defendant seeks on behalf of the Society to justify refusal to pay superannuation benefit are to be found in rule 24, clause 9, *viz.*, "He "(the member) shall be entitled to superannuation "benefit irrespective of any income he may receive "from private means, or from any other trade or "calling not connected with the Society, and no "inquiry shall be made with reference to a member's "private income." It is, I think, quite clear, and I am prepared so to hold, that superannuation benefit is not intended for persons still continuing to be employed at the trade. The very word "superannuation" means, in ordinary acceptance, that the person to whom it applies has reached a period or a stage beyond working years. Under these rules it is obvious that he cannot at the same time draw profits from the trade as a worker and concurrently receive superannuation benefits as an ex-worker from the Society. But provided his earnings come "from any other trade or calling not connected with the Society" they will not prevent him from receiving superannuation benefit.

The question, therefore, in the present case is whether the plaintiff's existing occupation as general manager of a stationery firm is "a trade or calling not connected with this Society" within the meaning of rule 24 (9).

I have no doubt that working as a general manager of a business is a "trade or calling." Is it a "trade or calling not connected with the Society"?

I think it is a sound rule of construction that where the same or similar terms are used in different parts of the same statute, they should, if possible, receive the same meaning.

We have been referred to rule 45, clause (1), *viz.* :—"Any member following any employment not con"nected with the trade—that is not practically working "at the trade and under the rules of the Society—for "a period of six months, and wishing to remain a "member, can do so, providing that he does not "infringe the rules of any other society."

Now this rule is based on the supposition of a corresponding state of affairs to that as in rule 24, namely, that the member is ceasing to work in the trade —not necessarily permanently and not on account of age in this case, but from choice, and in my judgment as a basic idea common to each is cessation of work at the trade, I think therefore the two rules may be considered as in *pari materia*. It is true that rule 24 clause 9 says, "trade or calling not connected with the Society," and here in rule 45 clause 1, the words are "employment not connected with the trade," but in my opinion this implies no real difficulty, and the expression "not connected with the Society" and "not connected with the trade" should receive the same meaning, as a trade society such as the present, I think, means the same thing as the trade the society carries on.

The importance of this is that in rule 45 clause 1 the Society themselves have interpreted "not connected with the trade" by the words "not practically working at the trade and under the rules of the Society," and therefore in rule 24 clause 9 I think that "not connected with the Society" means "not practically working under the Society's rules."

We have had a good deal of argument as to what the meaning of "practically working" is. It was urged before us that "practically working" necessarily involved "manual" labour. I think this is too narrow a construction. Almost every trade, if carried on to any extent, involves the employment of supervisors, who do not necessarily do manual work but are still practically working. Supervision is provided for in the constitution of this Society by rule 57, clause 9. I think, for instance, a gardener in charge of one of our city parks, who himself merely decides on what plants are to be used for bedding out purposes, and orders accordingly, while all the re-potting and planting is done by his subordinates, is none the less "practically "working at the trade of gardener" though he himself does no "manual" work. If I had to give "practically" what I considered to be its equivalent meaning I should say it meant "genuinely." "Genuinely" must be construed having regard, I suppose, to time spent, the amount of output and importance of work. I do not think that a member of the Lithographic Society would cease to become a member because he was not "practically working" if his duties as lithographer under a firm never went beyond supervision. But, as I have said, a man "practically working" at lithography, though not in a "manual" sense, must still be a lithographer. Can it be said that the general manager of a stationery firm, supervising, buying and selling production of all stationery requirements, supervision of all workers, is "practically working at the lithographic trade" because he is supervising fifteen per cent. of the employees ? My opinion is, his "trade or calling," is that of a works manager and not of a lithographer.

As I suggested during the argument, the general manager of one of our great shipyards here is carrying on the profession or calling of managership and is not simultaneously carrying on a trade connected at once with carpenters, joiners, upholsterers, engineers, rivetters, platers, boiler makers, riggers, book-keepers, designers, and the fifty other occupations that are being carried on under his general supervision.

I think therefore Mr. Justice Wilson was right in holding that the employment of the plaintiff as general manager within the meaning of question 2 was not a "trade or calling connected with the defendant's Society."

My colleague, Lord Justice Andrews, appeared to attach some importance to the fact that the plaintiff continued to pay his subscriptions as an ordinary member for a considerable time after he became entitled to retire. He might have been entitled "to leave" under the provisions of rule 45, or to retire after 1925, by reason of his age, and, naturally, in regard to a doubt suggested from such a source, I have given the matter very careful consideration. I cannot,

Moore,
L.C.J.

however, see that if the plaintiff has been remiss in accepting the situation and in not claiming the rights that I think he was entitled to under the constitution of the Society, he should now be prejudiced. It is not a matter of claim for equitable relief in which delay might defeat equity. It is a claim for his rights under the rules, and unless such delay and conduct should amount to estoppel or acquiescence, I cannot see that it has any vital bearing on the case.

I think the learned Judge was correct in his judgment that the plaintiff's employment as general manager is not a trade or calling in connection with the Society within the meaning of rule 24, clause 9, and that the appeal should be dismissed with costs.

Andrews,
L.J.

Andrews, L.J.: This is an appeal from an order of Wilson, J., made on the hearing of an originating summons brought for the determination of certain questions arising on the rules of the Amalgamated Society of Lithographic Printers and Auxiliaries of Great Britain and Ireland. The object of the questions was to determine the plaintiff's right to superannuation benefit.

The plaintiff, who is sixty-five years of age, served his apprenticeship as a lithographic printer with Messrs. William Strain & Sons, of Belfast. This apprenticeship expired on 30th April, 1884. In the previous October he became a member of the above-named Society and has remained such ever since. In 1898 he was appointed foreman of the lithographic department of Messrs. Little & McClean, Limited, Belfast, and held this position until May, 1923, when he was appointed general manager of the entire business of the firm. This post he still holds.

It is of importance to observe that the plaintiff has not retired from business altogether; further, he has not changed to a wholly new and independent business or trade. He has simply been promoted to a managerial position, in which his duties include (amongst others) the control and supervision of the lithographic department in which he formerly served as a working foreman. It was his training and experience as a lithographic printer which qualified him for the discharge of his present more responsible duties. He had not to learn a new trade. He contends that the holding of this position is no bar to his right to superannuation benefit under the Society's rules.

It will, I think, be generally admitted that a superannuation allowance only becomes payable when, by reason of old age, sickness, infirmity, or length of service, the person claiming same has retired from or ceased to be employed in the business or service in which he was engaged. Thus for the purpose of the Superannuation Acts, 1834 to 1892, superannuation allowance is defined as including "any pension or superannuation or other retiring allowance." (section 4 of 55 & 56 Vict., c. 40). Of course this definition does not govern the present case; it is merely illustrative of what I have stated to be, in my opinion, the generally accepted meaning of the term.

We must turn to the rules of the Society to see if there is any reason why it must bear some different meaning in the case under consideration. These rules confer on members the right to superannuation in either of two cases. The first is where a member of twenty years standing "through old age, infirmity or incurable disease is unable to obtain employment at the trade." (rule 24, clause 1). The second is where a member on attaining the age of sixty, having been in the Society thirty years successively, is entitled to claim superannuation benefit irrespective of the state of his health (rule 24, clause 2, last paragraph). The rules are inartistically drafted and grouped; and it is admitted that some words connoting a termination of employment or cessation of work on the part of a claimant must be imported into the second class of case. The mere attainment of the age of sixty years by a thirty years member will not suffice. What words should we then imply? In my opinion the most natural and proper words are those which are to be found expressed in the first class of case, *viz.*:—the claimant must have ceased "employment at the trade." Rule 24, clause 9, makes it further clear that employment in some other business or trade is no bar to the right to superannuation benefit, for that rule declares the right to exist "irrespective of any income he may receive—from any other trade or calling not connected with the Society."

The net question, therefore, to be determined in my opinion is whether the plaintiff's present position is "employment at a trade or calling not connected with the Society"? If the answer be in the affirmative, then he is not employed at the trade of lithographic printing, and is accordingly entitled to the benefit which he claims.

In my opinion it is impossible in the ordinary acceptation of language to say that a trade or business which includes lithographic printing as one of its branches is not "connected with the Society" of lithographic printers, which supplies the workers to that branch. It might be more accurate to say that the trade or business of stationers and printers includes the branch of lithographic printing. But, whatever be the particular terms which are used, one is "connected with" the other, and a man who superintends or manages the larger business is working at a trade or calling which is connected with its several parts. I am supported in the view which I have expressed by the important fact that ever since the plaintiff was appointed to his present position he has continued to pay the same full membership contributions to the Society as formerly. Both he and they have regarded him throughout as one of their members, and, therefore, under rule 1, as a person "working at lithographic printing." It further appears to me that the plaintiff admitted in terms that his appointment has been in a trade or calling, "connected with" the lithographic business or Society, for in his letter of 30th June, 1925, he pleaded that he was "manager of the whole business and was not associated specially with the litho. department." It is also admitted in his affidavit that he exercises general control and supervision over the lithographic department; yet it is contended that his calling is not "connected with" the trade carried on therein.

A strenuous effort was made by Counsel for the plaintiff to bring their client under the provisions of

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rule 45, clause 1—the case of a "member leaving the trade." This rule, they say, clearly defines what is meant by "employment not connected with the trade," namely, employment which does not involve "practically (which they submit means "manually") working at the trade."

I reject the argument, which appeared to me to go to the root of their whole case, on several grounds. In the first place, I cannot agree that the word "practically" as here used means "manually." My opinion in this point is, I understand, shared by the Lord Chief Justice in the judgment which he has just delivered. Why must the word be given, in this rule, a meaning which is certainly not its primary meaning—indeed, it is one which is not to be found in either the Oxford or Webster's dictionaries. If "manually" was intended, why was this unambiguous word not used? But, even if I am wrong in this, it seems to me that so to construe the rule as to regard the words "not practically working at the trade" as an exhaustive definition of the phrase "following any employment not connected with the trade" would not only give them an unnatural and unjustifiably restricted meaning but it would also give rise to certain most illogical consequences. Thus, a working foreman of a department would be in the trade, whilst a non-working foreman or an overseer would be out of it because he was not manually working at it. The former, whilst so employed, could under no circumstances receive superannuation benefit, whilst the latter, on the fulfilment of the other necessary conditions, would be entitled to receive it. Perhaps my main ground, however, for rejecting the argument is that in my opinion it is not open to the plaintiff on the admitted facts to contend that he "left the trade" within the provisions of this rule. It is significant that the rule was never once referred to by the plaintiff in correspondence or otherwise since he first presented his lethargic claim seven years ago. Further, membership under this rule has certain pecuniary advantages—reduced weekly contributions amounting to two shillings and one penny per week in place of two shillings and sixpence per week and exemption from all levies. Plaintiff has throughout continued to pay the full weekly membership contributions of Two shillings and sixpence and all levies as they fell due. Finally, rule 45, clause 2, provides "that members wishing to avail themselves of this rule must immediately upon leaving the trade inform the secretary of the branch." Admittedly, no such notice was ever given. In truth, in my opinion, the plaintiff never served such notice because he knew that he was not "leaving the trade"—an operation which contemplates at least the possibility of a member joining another Society whose rules he is forbidden to infringe (rule 45, clause 1). Both parties, the plaintiff and the Society, regarded the plaintiff as continuing in full membership with all the advantages to the plaintiff which that involved, but subject also to the disadvantage that, as he was still by mutual assent employed at the trade, he was not entitled to superannuation benefit which would only become payable when he had retired from it. It is no doubt argued that the greater includes the less, and that the plaintiff cannot be deprived of rights because he paid larger sums to the Society than he was liable to do. That, of course, is not the point. He elected to remain a full member, and as this was acquiesced in, he must be treated, as between the parties to such membership contract, as working at the trade; for it is only those who are working at the trade who are entitled to full membership. Let me test the matter further in this way. One of the privileges of full membership is accident benefit provided for in rule 22. A member who has "left the trade" and who pays the reduced subscriptions under rule 45 is not eligible for accident benefit. Had plaintiff met with an accident involving permanent disablement at any time during the years that he has been general manager and in full membership with the Society, would any Court have listened to the Society if they had contended that they were not liable, on the ground that, although they had accepted a full membership subscription, he had in fact "left the trade" in 1923, and so must be deemed to be only a limited or qualified member under rule 45 without any right to accident benefit. In my opinion no such argument would be entertained. If then, it would not have been competent for the Society to contend that plaintiff was in reality a member under rule 45 in order to deprive him of a full membership right, how can plaintiff be permitted to contend that he comes within that rule in order to entitle him to superannuation benefit as a member "not practically working at the trade"?

The plaintiff's whole case appears to me to be based on first placing a certain possible but not necessary, or, in my opinion, natural, meaning upon a phrase of doubtful construction in an ambiguous rule, with the provisions of which plaintiff never conformed; and then extending that meaning to another similar but not identical phrase in another rule relating to an entirely different subject-matter.

For these reasons I am of opinion that the plaintiff has not established his right under the rules to superannuation benefit. This was the decision given by the executive committee in 1925, and acquiesced in for upwards of four years by the plaintiff himself. I regret that I cannot agree with my colleagues, who, in over-ruling this decision, necessarily declare that a member of the Society, who was during all this period receiving a substantial salary by reason of his promotion in business to higher rank, was entitled under the Society's rules to receive superannuation benefit, though he would admittedly have had no claim to such benefit if he had continued to perform the more humble duties and to receive the more modest remuneration of a journeyman. This is a strange conclusion in regard to a benefit payable to those who are in need or require help because of their old age, infirmity, or incurable disease. It is a conclusion, to my mind, so anomalous and unjust, that I cannot bring myself to believe that it was ever intended by the framers of the rules; and in my opinion it is a conclusion which should not be arrived at in the absence of clear and coercive language, which, it must be admitted, is conspicuously absent from the rules upon which the plaintiff bases his claim in the present case.

Best, L.J.: The question for decision in this case is whether the plaintiff is entitled to superannuation benefit under the rules of The Amalgamated Society of Lithographic Printers and Auxiliaries thereto of Great Britain and Ireland.

Mr. Justice Wilson has decided in favour of the plaintiff and against this decision the appeal is taken by defendant who is the general secretary of the Society.

[His Lordship, having stated the facts, continued :—]

Rule 1, clause 1, of the rules provides that the Society shall consist of members working at lithographic printing, etc., who shall have served the period of apprenticeship laid down by the rules, or otherwise recognised by the Society; and further of members working at stone or plate preparing, etc. Accordingly it would appear that the Society consists of working members, that is, of persons practically working at the trade, though it is provided in rule 45 that members leaving the trade, in rule 46 that members commencing business on their own account, and in rule 47 that members going abroad, may retain membership on complying with the stipulations set out in those respective rules.

Rule 24 deals with superannuation and prescribes the conditions under which it may be granted.

Clause 1 provides that any member who has been twenty years successively in the adult section of the Society and who through old age, infirmity or incurable disease, is unable to obtain employment at the trade and applies for superannuation benefit shall take certain steps, and by clause 2 (should the branch be satisfied with the validity of his claim) the executive committee shall have power to grant the sums mentioned in the first two paragraphs of that clause.

Inability to obtain employment through one or more of the causes mentioned is an indispensable qualification for superannuation benefit under clause 1 of the rule.

The third paragraph of clause 2 provides that any member on attaining the age of sixty, having been in the Society thirty years successively, and desirous of claiming superannuation, may do so irrespective of the state of his health, and it is upon this provision that the plaintiff must base his claim as he is sixty-five years of age and has been in the Society for upwards of thirty years successively.

It is argued by appellant's Counsel, and the learned Judge has so held, that there is an assumption underlying this clause that the member applying for superannuation has ceased to work at the trade. I think if some such proviso were not read into the clause it would be possible for a member to continue working at the trade and to be eligible to draw superannuation benefit at the same time, a result which would be absurd and repugnant to the objects of the Society as stated in rule 1, clause 2.

Clause 9 of this rule 24 provides that a member shall be entitled to superannuation benefit irrespective of any income he may receive from private means, or from any other trade or calling not connected with the Society, and the question which arises is whether the plaintiff has ceased to work at the trade, and further if he has so ceased, is he disentitled to superannuation benefit by the receipt of an income from any other trade or calling connected with the Society ?

The plaintiff ceased to work at lithographic, etc., printing when in 1923 he became general manager for Messrs. Little & McClean, but from that time onward has he received and is he now receiving an income "from any other trade or calling not connected with the Society" ? If the income which McCord receives as manager be income from any other trade or calling not connected with the Society, he is entitled to superannuation.

Is, then, acting in a managerial capacity for a firm employing in one of their many departments members of the Society as lithographic printers, work at a trade or calling not connected with the Society ?

Two questions arise :—first—Is acting as general manager for Messrs. Little & McClean " work at a trade or calling " ; and, secondly—If it be work at a trade or calling, is such work " connected with the Society " within the meaning of the rule ?

Mr. Ellison's argument is that the Society was established to benefit working men, that is, men working at a handicraft, and that trade must here be construed accordingly.

In my opinion this contention is sound, and I conclude that acting as general manager is not work at a trade within the meaning of the rule. The word "calling" was probably intended to have a wider meaning than "trade" in this particular context and I think it reasonable to hold that acting as general manager is work at a calling within the meaning of the rule. The calling must be connected with the Society to justify the withholding of superannuation benefit from the plaintiff. In my opinion the work of general manager of a business which has many departments in one of which are employed a few men who are members of the Society is not work at a calling connected with the Society within the meaning of the rule. If it were such work, then the plaintiff's right to superannuation benefit would depend on whether at any particular time Society men (by which I mean members of the Society practically working at the trade of a lithographer, etc.) or non-society men were employed in the lithographic department of Messrs. Little & McClean's business. The result would be that if for any reason the society men in the lithographic department were replaced by non-society men, the plaintiff would be entitled to superannuation benefit because his income as manager would, in that event, be income received from a calling not connected with the Society and by rule 24, clause 9, could not be taken into account in determining his rights. It is straining the meaning of the rule to say that disqualification follows from a connection arising by reason of the fact that Society men are engaged in a department of the business managed by the plaintiff. The connection must, in my opinion, be of a closer nature to impose disqualification. This conclusion is confirmed if we look to the meaning of "connected" in rule 45, clause 1, where it is provided that any member following any employment not connected with the trade is, for the purposes of that clause, described or defined as a member not practically working at the trade and under the rules of the Society showing as it does the narrow meaning put on employment which is connected with the trade.

I come to the conclusion, therefore, that the provisions of rule 24, clause 9, are not a bar to the plaintiff's right to superannuation benefit.

It is said, however, that the plaintiff is still a full member of the Society because after his appointment in 1923 to the position of manager he did not comply with the provisions of rule 45, clause 1. Rule 45 has the heading "Members leaving the trade," and in my opinion the plaintiff, who certainly ceased to work at the trade on his appointment as manager, then left the trade, but this does not seem to have occurred to him or to the Society, and he continued to pay the full weekly subscription of two shillings and sixpence, whereas if when he left the trade he had formally intimated his desire to remain a member he would have saved fivepence a week in his payments to the Society from the date of his appointment until the present time, and would under rule 45, clause 1, have remained eligible for sick, superannuation and funeral benefit.

The trivial nature of his omission to avail himself of the provisions of the rule is shown by the fact that he has under rule 45, clause 2, made himself liable to be fined five shillings.

The plaintiff has attained the age of sixty-five years, the necessary age for superannuation being sixty; he has been in the Society since 1883, that is, for forty-seven years successively, the qualifying time being thirty years, and during this period of forty-seven years has complied with all the rules of the Society except for the small omission just mentioned, and I think that he should only be deprived of his superannuation rights by provisions that are clear and unambiguous. In my opinion an income as general manager of a business containing many departments, one of which is concerned with lithographic work, is not so clearly and unambiguously an income from any other trade or calling connected with the Society as to deprive the plaintiff of his right to superannuation.

Solicitors for the appellant: *Crawford & Lockhart.*
Solicitor for the respondent: *John Johnson.*

J. D. C.

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1931.

Jan. 26.

IN RE SAMUEL WIGHTMAN, DECEASED; WIGHTMAN v. COUSINS AND SKILLEN (1).

(1931. No. 7.)

Practice—Will—Construction—Trusts of Will already administered—R. S. C. 1905, *Order* 54A, *r.* 4 *and Order*, 55, *r.* 4.

The testator had, by his will, bequeathed his farm to his grandson, W. J. W., on condition that he should reside on the farm and assist in the management thereof until he attained the age of 20 years, with a gift over to testator's son, W. W., in the event of this condition not being fulfilled. In the year 1928, W. J. W. attained the age of 21 years, whereupon the surviving trustee of the will gave him possession of the farm.

On the death of W. J. W. in the year 1930, W. W. brought a summons for the construction of the will. It was contended on his behalf that W. J. W. was not entitled to the farm, under the terms of the will, by reason of the fact that he had failed to comply with the conditions of the bequest. The plaintiff further submitted that the Court had jurisdiction to determine the matter either under Order 54A, rule 4, or under Order 55, rule 4.

Held, that the trustee of the deceased's will having administered his estate and allowed W. J. W. into possession of the farm, the question in issue was not a proper one to be determined on an originating summons either as a matter arising in the administration of the deceased's estate or upon the construction of his will.

SUMMONS for the determination of certain questions arising under the will of Samuel Wightman.

By his will, dated the 9th February, 1910, Samuel Wightman devised his farm of land at Brackey, in the County of Down, to his wife, Bessie Wightman, for her life and upon her death to his daughter, Margaret Jane Wightman, for life with remainder to his grandson, William John Wightman. By a codicil the testator declared that the bequest of the farm to his said grandson was on condition that he should reside on the farm and assist in the management thereof until he attained the age of twenty years, and in default of his doing so without the consent of Margaret Jane

(1) In the Chancery Division before Wilson, J.

Wightman, the testator bequeathed the farm to his son, William Wightman, the plaintiff.

The testator died in the year 1914; Margaret Jane Wightman died in the year 1919, and Bessie Wightman died in the year 1923. The testator's grandson, William John Wightman attained the age of twenty-one years in the year 1928 and was thereupon given possession of the farm by the defendant, Robert Cousins, who was the surviving trustee of the will.

William John Wightman died on the 19th April, 1930, and letters of administration of his estate were granted to the defendant, Jane Skillen. It was alleged that William John Wightman had, in the year 1919, without the consent of Margaret Jane Wightman, left the farm and had thus failed to fulfil the conditions in the will relating to the bequest. The plaintiff accordingly brought the present proceedings for the construction of the will, with the object of having the validity of the conditions in the will and the question of the ownership of the farm determined.

McSparran for the plaintiff:

The question of the ownership of the farm depends upon the construction of the deceased's will and accordingly the Court has jurisdiction to determine the matter under Order 54A. Alternatively the question is one which arises in the administration of the deceased's estate and should be determined under the provisions of Order 55, rule 4 (*a*).

Ellison for the defendant, Robert Cousins.

Johnson for the defendant, Jane Skillen.

[Counsel for both defendants were willing that the question in issue should be determined in the present proceedings.]

WILSON, J.: I am asked to determine the question as to who is entitled to the deceased's farm, on the ground that it is a question which arises upon the construction of his will and accordingly comes within

WILSON, J.

the provisions of Order 54A. Alternatively it is submitted that I should deal with the matter on the basis that the question is one, arising in the administration of the deceased's estate, which affects the rights or interest of a person claiming to be a legatee and therefore comes within Order 55, rule 4 (*a*). The estate of Samuel Wightman, deceased, has, however, already been administered by Robert Cousins, the surviving trustee of the will, and William John Wightman was given possession of the farm nearly three years ago. This being so I am not going to re-open the administration at this stage. As to construing the will, I have an express discretion under Order 54A and I refuse to exercise this discretion for the purpose of enabling the ownership of the farm to be decided, at this stage, on an originating summons. This is a matter which should be determined in ejectment proceedings on the title. I dismiss the plaintiff's application with costs.

Solicitor for the plaintiff: *James F. Fitzpatrick.*

Solicitor for the defendant, Robert Cousins: *A. J. Lewis.*

Solicitor for the defendant, Jane Skillen: *James Irwine.*

J. D. C.

C.A.
1931.

Feb. 16.

IN THE MATTER OF AN APPLICATION UNDER THE TOWN TENANTS (IRELAND) ACT, 1906.

PORTER, Applicant ; CORSCADDEN, Respondent (1).

Landlord and Tenant Appeals to Court of Appeal under Town Tenants (Ireland) Act, 1906—*Practice—Jurisdiction of Court of Appeal—Whether Appeals to be treated as complete re-hearings or as limited to ascertaining whether there was any evidence on which finding of Recorder or County Court Judge could be sustained—Good and sufficient cause for terminating the tenancy—Onus of proof—Town Tenants* (*Ireland*) *Act,* 1906 (6 *Edw.* 7, *c.* 54) *section* 5—*Loss of goodwill.*

The tenant had carried on business as a retail grocer, in premises in the City of L. He had also used these premises as a wholesale distributing centre for supplying groceries to other retail shops belonging to him. He was for a considerable period in occupation of the premises under successive leases, but eventually became a yearly tenant.

The landlord determined the yearly tenancy which was held at a rent of £80 per annum, but offered to renew the tenancy at an increased rent of £100. The tenant refused to accept this and entered into arrangements to transfer his business to new premises some two hundred yards distant. After the tenant had made these arrangements the landlord offered a renewal of the tenancy which was not accepted. The tenant vacated the premises and transferred his business to the new premises, but claimed compensation for loss of goodwill and costs of removal under the Town Tenants (Ireland) Act, 1906. The Recorder of L. held that the tenancy had been unreasonably determined, and that the tenant was entitled to compensation.

The landlord appealed to the Court of Appeal for an order that the Recorder's decision should be set aside, and the application dismissed on the grounds (inter alia) that the tenancy had not been unreasonably determined, and also that there was no evidence of loss of goodwill.

Section 11 of the Town Tenants (Ireland) Act, 1906, provides that "any person aggrieved by any determination of the county court under this Act may appeal either—(*a*) to the Judge of Assize or a Judge of the High Court, as the case may be, in accordance with the provisions of the County Courts (Ireland) Acts, 1851 to 1889, relating to appeals in the case of ordinary civil bills ; or (*b*) to the Court of Appeal in accordance with rules of the Supreme Court."

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(1) In the Court of Appeal before Moore, L.C.J., Andrews and Best, L.JJ.

At the hearing before the Court of Appeal, it was contended on behalf of the landlord that the appeal should be treated as a complete re-hearing, but on behalf of the tenant it was contended that the Court of Appeal was only entitled to ascertain whether there was any evidence on which the finding of the Recorder could be sustained.

Held, by the Court of Appeal (Moore, L.C.J., Andrews and Best, L.JJ.) :—

(*a*) that the Court of Appeal was entitled to treat the appeal as a complete re-hearing;

(*b*) that the onus of proving that the landlord, without good and sufficient cause, had terminated the tenancy, lay upon the tenant, and that the tenant had not satisfied that onus ;

(*c*) that the landlord had good and sufficient cause for terminating the tenancy where the tenant refused to continue the tenancy at the offer of a reasonable rent, Gullery v. Gregg (42 I.L.T.R. 118) dissented from ;

(*d*) that there was no evidence of loss of goodwill.

APPEAL by the landlord from the decision of the Recorder of Londonderry awarding the applicant the sum of £234 10s. 0d. for loss of goodwill and expenses of removal of goods, in respect of a claim made under section 5 (1) of the Town Tenants' (Ireland) Act, 1906, connected with the ejectment of the applicant from premises in the City of Londonderry.

The applicant had for many years carried on business at these premises situated at No. 3 Sackville Street, Londonderry, as a retail grocer under the name of "The All Cash Stores." He had also used the premises as a wholesale distributing centre for supplying groceries to other retail shops belonging to him in the city of Londonderry.

The premises were originally held by one Frances A. Stevenson from the predecessors in title of the respondent under a lease, dated 26th May, 1899, for a term of 10 years from 1st May, 1899. This lease must have been determined prior to its expiration, as by lease dated 3rd January, 1903, the premises were demised to the applicant for a term of 10 years from 1st November, 1902, at a rent of £75. This lease contained a covenant by the applicant that, when called upon, he would rebuild a partition wall between the wall of the premises and the shop, he having obtained leave to remove this partition wall, and to include the hall in the space of the shop. On the 13th August, 1913, a further lease of the premises was made to the applicant for a term of 10 years from 1st November, 1912, at a rent of £60, with similar covenants. This lease would in the ordinary course have expired on 1st November, 1922, but on 26th April, 1922, a notice to quit was served on the applicant to determine an alleged tenancy from half-year to half-year on 1st November, 1922, and on 23rd July, 1923, a notice under the Rent and Mortgage Interest (Restrictions) Act, 1920, was served on the applicant, increasing the rent of £65 by £13 a half-year. The applicant remained in occupation of the premises and there was apparently a dispute as to the amount of the rent, but on 11th January, 1924, an agreement was made between the applicant and the landlord under which the applicant was to remain in occupation of the premises at a rent of £80 a year. The applicant remained in possession of the premises under this agreement, but sometime towards the end of 1927, the landlord made a demand for an increase in the rent of the premises from £80 to £100 a year, and the applicant having refused to give this increased rent, a notice to quit, dated 21st October, 1927, to quit on 1st May, 1928, was served on him.

An ejectment founded on this notice to quit came before the Recorder of Londonderry, at the October Sessions, in 1928, but as he was of opinion that the tenancy of the applicant under the arrangement of 11th January, 1924, was a yearly tenancy from 1st November, in each year, he held that a notice to quit must be for the November gale, and not for a May gale, and accordingly the notice to quit was bad. He, therefore, dismissed the ejectment.

The tenant continued in occupation of the premises, and on 29th April, 1929, a notice to quit for 1st November, 1929, was served on him, as he still refused to agree to an advance of £20 a year in his rent. This notice to quit validly determined the yearly tenancy.

The tenant knowing that he would have to leave the premises in Sackville Street, during the summer of 1929, made an agreement to take certain premises in Strand Road, Londonderry, as premises into which he might transfer the business he had carried on in the Sackville Street premises. After the notice to quit of 29th April, 1929, had matured, and after he had entered into the agreement to take the Strand Road premises, the tenant received from the agents of the landlord a letter of 11th November, 1929, offering a renewal of his tenancy in Sackville Street, at a yearly rent of £87 10s. 0d. This was the first intimation that the tenant received that the landlord would agree to any less rent than £100. The tenant did not accept this offer, but went out of occupation of the premises in May, 1930, and brought a claim before the Recorder of Londonderry for compensation under the Town Tenants (Ireland) Act, 1906, for loss of goodwill and costs of removal.

The Recorder of Londonderry decided that the tenancy from year to year had been unreasonably determined by the landlord, and that the applicant was entitled to claim compensation. He found that the applicant was entitled to the sum of £250 in respect of loss of goodwill, and £14 10s. 0d. in respect of the expenses of the removal of goods, and that the respondent was entitled to a set-off of £30, being the cost of altering shop window and forming hall to dwelling house above the shop, including the erection of partition wall between hall and shop, and restoring the premises, leaving a balance of £234 10s. 0d., due to the applicant.

The landlord appealed to the Court of Appeal.

Babington, K.C. (*Attorney-General*) and *McCoy* for the appellant :—

It is admitted that section 5 of the Town Tenants (Ireland) Act, 1906, applies to the present case. There is no evidence that this rent of £100 was unreasonable. We submit that the learned Recorder misconceived what his finding ought to be. He seems to have held that the offer by the landlord of a renewal of the tenancy at a rent of £87 10s. 0d. was an admission that a rent of £100 was unreasonable. We submit that this argument is not sound. There was no evidence given on behalf of the tenant that a rent of £100 for the premises was unreasonable.

The onus of proving that the landlord acted without good and sufficient cause lies upon the tenant.

We quarrel with the Recorder's finding that there was a loss of goodwill.

The whole case turns on the question whether there was unreasonable disturbance or not. There is nothing to show that it was unreasonable for the landlord to demand an increase of rent. The Recorder had no evidence before him from which he could say that the landlord had unreasonably disturbed the tenant in his holding.

As to the claim for goodwill, the new premises are on a main thoroughfare, in the same neighbourhood as the old premises. One cannot arrive at goodwill by a process of computing profits or loss of profits. Goodwill is composed of a number of things. It was defined by Lord Eldon in *Crutwell v. Lye* (1), at page 346, as being " nothing more than the probability that the old customers will resort to the old place."

In *Herron v. O'Donnell* (2), Gibson, J., said at p. 228, that the tenant cannot obtain compensation for business which she had carried with her to another set of premises. In the present case there is no suggestion that the new premises are not equally as suitable as the premises in Sackville Street. Loss of goodwill cannot be assumed because of loss of profits. We submit that the Recorder should have distinguished between loss of goodwill and loss of profits, and that his finding of loss of goodwill was a pure assumption.

We submit that the appeal to the Court of Appeal should be treated as a complete re-hearing.

[They also referred to *Hogan v. O'Grady* (3).]

(1) 17 Ves. Jun. 335.
(2) 42 I.L.T.R. 227.
(3) 46 I.L.T.R. 50.

Murphy, K.C., and *MacDermott* for the respondent :

It was decided in *Haughton v. Ross* (1), that " good and sufficient cause " in s. 5 must be a cause emanating from or given or produced by the tenant and cannot be referred to anything moving the landlord unless it can be traced to the action of the tenant. In that case Kenny, J., refused to follow *Hogan v. O'Grady* (2). In *Cosgrove v. McCormick* (3), Ross, J., said that " good and sufficient cause " must refer to the relationship between landlord and tenant, and must be some cause given to the landlord by the tenant—some conduct on the part of the tenant which the landlord is entitled to consider unreasonable. In *Gullery v. Gregg* (4), it was held that the fact that the premises which are the subject of a letting have increased in value owing to a general rise of the property, and that the tenant refuses to pay a proportionately increased rent, does not afford the landlord good and sufficient cause for terminating the tenancy within s. 5 of the Town Tenants Act. We submit that *Gullery v. Gregg* (4) is full authority for the proposition that we contend for. We submit that no increase of rent is justifiable if the tenant has not done anything to give the landlord cause to disturb, and that the offer of renewal at a rent of £100 was not an offer at a reasonable rent.

Quite apart from *Gullery v. Gregg* (4), the only real offer of renewal was at a rent of £100 and that rent was unreasonable.

We submit that the tenant has proved a loss of goodwill. The Recorder has so found.

We submit that the appeal should be treated on the same basis as a new trial motion, and that the Court of Appeal is not entitled to do more than ascertain whether or not there was any evidence on which the finding of the Recorder could be sustained.

[They also referred to *Crawford v. McCormick* (5), *Bloomer v. O'Hara* (6), *McAuliffe v. O'Connor* (7).]

(1) 49 I.L.T.R. 72.
(2) 46 I.L.T.R. 50.
(3) 47 I.L.T.R. 210.
(4) 42 I.L.T.R. 118.
(5) 51 I.L.T.R. 56.
(6) 51 I.L.T.R. 71.
(7) 41 I.L.T.R. 142.

MOORE, L.C.J.: (His Lordship having stated the facts, proceeded):—

This is an appeal from a judgment of the Recorder of Londonderry whereby he awarded to an outgoing tenant a sum of £234 10s. 0d. in respect of a claim made under section 5, sub-section 1, of the Town Tenants (Ireland) Act, 1906, and several important questions have been argued before us.

The first is as to our jurisdiction sitting as the Court of Appeal. Under section 11 any person aggrieved by any determination of the County Court can appeal either to the Judge of Assize or in the case of the Recorder of Belfast, to a Judge of the High Court or to the Court of Appeal in accordance with Rules of the Supreme Court. Mr. Murphy has suggested that we are not entitled to do more than ascertain whether or not there was any evidence on which the finding of the learned Recorder could be sustained, treating it, therefore, very much as though the present appeal were a new trial motion. On the other hand, Counsel for the landlord have asked us to treat the appeal as a complete re-hearing and have argued that, at any rate, we have the same jurisdiction as we would have in hearing an appeal from the Chancery Judge in a Chancery action. In former days when appeals from the equity side of the county court came to a Judge of the High Court on the County Court Judge's notes it was always treated as a complete re-hearing and the Judge was not limited in the manner now suggested by Mr. Murphy. Under the Act, the appeal may be taken either to a Judge of the High Court or to the Court of Appeal, and admittedly the Judge of the High Court would treat it as a complete re-hearing. I think that the Court of Appeal is intended to have a similar jurisdiction and, therefore, in analogy to former practice that we should proceed to treat this as if it were an equity civil bill appeal.

The tenant is not entitled to receive any compensation under section 5, sub-section 1, of the Act unless the "landlord without good and sufficient cause terminates or refuses to grant a renewal of the tenancy."

In my opinion the onus of proving that the landlord has acted "without good and sufficient cause" lies upon the tenant and the question for us to-day is how far the tenant has satisfied us that the landlord has so acted. In the present case the facts are beyond dispute. After a considerable period, during which the tenant was in occupation of the premises under successive leases and eventually became a yearly tenant, the landlord determined the yearly tenancy which was held at a rent of £80 per annum but offered to renew the tenancy at an increased rent of £100. This the tenant refused to accept and entered into arrangements to transfer his business to new premises belonging to another person some two hundred yards away. After he had done this the landlord made a fresh offer of £87 10s. 0d. a year which, under the circumstances, the tenant refused to accept.

It has been argued before us and several cases have been cited that it is not good and sufficient cause to refuse to grant a renewal of the tenancy where the tenant declines to pay an increased rent. I do not, however, think that this is correct in law. In my opinion, the landlord has good and sufficient cause for terminating the tenancy if the tenant refuses to continue at the offer of a reasonable rent and I therefore dissent from the judgment in *Gullery v. Gregg* (1).

[His Lordship then referred to *Herron v. O'Donnell* (2), *Hogan v. O'Grady* (3), *Haughton v. Ross* (4), *Cosgrove v. McCormick* (5), *Crawford v. McCormick* (6), and *Bloomer v. O'Hara* (7) and continued :—]

The only question remaining for us therefore is this : Was the offer of the rent at £100 per year reasonable ? No evidence was called on behalf of the tenant to show that this was unreasonable. The burden of this proof lay on him. Evidence was called on behalf of the landlord to show that it was reasonable but Mr.

(1) 42 I.L.T.R. 118.
(2) 42 I.L.T.R. 227.
(3) 46 I.L.T.R. 50.
(4) 49 I.L.T.R. 72.
(5) 47 I.L.T.R. 210.
(6) 51 I.L.T.R. 56.
(7) 51 I.L.T.R. 71.

MOORE,
L.C.J.

Murphy has strongly pressed upon us the landlord's letter of 11th November, 1929, offering the premises at the new rent of £87 10s. 0d., and says that if that were reasonable we are coerced to find that the rent of £100 must be unreasonable. I do not think this contention is sound. I think it quite possible that both £100 and £87 10s. 0d. may be reasonable. If £100 is reasonable, it is clear that £87 10s. 0d. is still more so, but one can not argue that if £87 10s. 0d. is reasonable, £100 is necessarily not so.

[His Lordship then continued to deal with the facts of the case and said that the tenant had stated if a missing sum of £150 were accounted for in one particular way he would have suffered a loss but if on the other hand it had disappeared through leakage or pilfering of his own servants then he would have suffered no loss for which he could charge the landlord, and continued :]

" It lay on the tenant to prove a definite loss if he would succeed in the Appeal. No such loss had, in fact, been proved, and I am of the opinion that the landlord's appeal succeeds."

ANDREWS,
L.J.

ANDREWS, L.J. : I have nothing to add to the judgment that has just been delivered.

BEST, L.J.

BEST, L.J. : I also agree.

The appeal was allowed ; the applicant's application was dismissed, the cost in the County Court and of the appeal to be taxed by the Taxing Master and paid by the applicant to the respondent.

Solicitor for the tenant : *T. C. Wylie.*
Solicitors for the landlord : *Caldwell & Robinson.*

J. McC.

C.A.
1931.

Feb. 17, 19.

FIELD v. CATHERWOOD, LTD. (1)

(1930. No. 2607.)

Practice—Particulars—Action for personal injuries—Further and better particulars of special damage.

In an action for personal injuries the plaintiff alleged that the accident was caused by negligent driving on the part of the defendants' servants. The solicitor for the defendants served a notice on the solicitors for the plaintiff to supply him with further and better particulars of the items of special damage set forth in the statement of claim relating to (1) medical, surgical and nursing expenses, and (2) to the loss of profits, with all necessary details, dates, and items covering such period of time and all previous periods of time necessary to be examined for the purpose of comparison.

The plaintiff's solicitors refused to supply these particulars, on the ground that it would be prejudicial to the interests of plaintiff's case to give them.

The defendants then applied to the Lord Chief Justice by motion for an order that the plaintiff should deliver the particulars as set out.

The Lord Chief Justice made no rule on the motion, and from his order the defendants appealed.

Held, by the Court of Appeal (Andrews and Best, L.JJ.) that the plaintiff should deliver to the defendants further and better particulars of the nature indicated bv the Court.

APPEAL from an order of Moore, L.C.J., making No Rule on a motion by the defendants for further and better particulars.

An action for personal injuries was commenced by the plaintiff, in which he claimed damages amounting to £10,000. The accident, out of which the action arose, was caused, it was alleged by the plaintiff, by the motor car in which the plaintiff was travelling as a passenger, being run into by a motor bus belonging to the defendants. In his statement of claim the plaintiff alleged that the accident was caused by negligent driving on the part of the defendants' servants.

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(1) In the Court of Appeal before Andrews and Best, L.JJ.

C.A.
1931.

FIELD
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The particulars of special damage set forth by the plaintiff in his statement of claim were :—

(*a*) Medical, surgical, and nursing expenses from the 26th day of April, 1930, to date, and still continuing. The amount of the plaintiff's liability in respect of such expenses has not yet been ascertained.

(*b*) Loss due to plaintiff's enforced absence from his business as representative of the International Correspondence Schools. The plaintiff is remunerated on the basis of a percentage of the profits earned in his district, and is under obligation to pay part of the expenses in the event of a loss. The extent of the plaintiff's loss under this paragraph has not yet been ascertained.

A notice was served by the solicitor for the defendants on the solicitors for the plaintiff, requiring them to supply further and better particulars of (1) the medical, surgical, and nursing expenses alleged in paragraph (*a*), of the items of special damage set forth in the statement of claim, and (2) of the loss of profits alleged in paragraph (*b*), of the items of special damage, with all necessary details, dates, and items covering such period of time and all previous periods of time necessary to be examined for the purpose of comparison.

The plaintiff's solicitors refused to supply the particulars asked for, stating that they had submitted the application to Counsel who considered that it would not be possible without prejudice to the interests of the plaintiff's case to give any further particulars.

The defendants then applied to the Lord Chief Justice by motion for an order that the plaintiff should deliver the particulars as set out.

The Lord Chief Justice made No Rule on the motion, and from his order the defendants appealed.

Murphy, K.C., (with him *Fox*) for the appellants :—

We submit that in a claim of this character, the defendants are entitled to information. In England the right to such particulars as are asked for in the present application is not contested.

In *Watson v. The North Metropolitan Tramways Company* (1), the Queen's Bench Division, consisting of Cave and Wills, JJ., decided that particulars of loss of business, should be given, in an action for personal injuries. In that case Cave, J., said that so far as he was concerned he would see that in every case where particulars could be given, they should be ordered to be given. There is no reason on principle why the plaintiff should not give such particulars. The plaintiff must know what he has been paid in salary and commission.

I submit we are entitled to the order sought.

Babington, K.C., (*Attorney-General*) (with him *Warnock* for the respondent):—

The plaintiff should not be required to give particulars of what he earned during the previous year. I am not aware of any case which requires particulars to be given of a previous year's earnings. The Court ought to be very careful in granting applications for particulars. The defendants are asking for further and better particulars of the evidence on which the plaintiff's claim is to be substantiated. I submit that the Lord Chief Justice was perfectly right in the course that he took. *Watson v.The North Metropolitan Tramways Company* (1) is different from the present case.

I submit that the plaintiff has given all the particulars that can reasonably be required of him.

ANDREWS, L.J.

ANDREWS, L.J., delivered the judgment of the Court as follows:—

In this case the defendants applied to the Lord Chief Justice by motion for further and better particulars (1) of the medical, surgical, and nursing expenses alleged in paragraph (*a*) of the items of special damage set forth in the statement of claim and incurred to date, and (2) of the loss of profits alleged in sub-paragraph (*b*) of the same paragraph of the statement of claim to have been caused to the plaintiff or suffered by him to date, with all necessary details, dates, and items covering such period of time and all previous periods of time which it is necessary to examine for the purpose of comparison The Lord Chief Justice made no rule on the motion, and from that order the defendants have appealed.

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(1) 3 T.L.R. 273.

By letter, dated 21st January, 1931, the solicitors for the plaintiff had written to the defendants' solicitor stating that they had duly received a letter from him asking for further particulars. They had, they said, submitted this letter to Counsel who considered that it would not be possible without prejudice to the interest of the plaintiff's case to give any further particulars, and they could not therefore comply with the request. This letter, in our opinion, contains an implied admission that details were in the possession of the plaintiff's solicitors, but that same would not be given.

The defendant's solicitor then wrote on 22nd January that he would apply at once to the Court to compel delivery of the particulars. On that same day, the plaintiff's solicitors wrote that, so far as they had been furnished with details of expenses in the past, they sent particulars, but there were several accounts not yet furnished, and they could not give them, and consequently the particulars could not be taken as conclusive, and were without prejudice to the plaintiff's right to give evidence of all further accounts which might be obtained up to the time of the hearing of the action.

(His Lordship then referred to the affidavit made by the plaintiff on 29th January in which he stated that his solicitors had furnished a detailed list of medical and nursing expenses, but that he was unable to give the particulars asked for in respect of his loss of profit due to his enforced absence from business, and continued):—No indication has been given by the plaintiff in letter or affidavit of the manner in which he intends to put forward his claim for loss of profits or of the amount of same, and there are no details of the medical visits alleged to have been paid to him.

The case of *Watson v. The North Metropolitan Tramways Company* (1) in our opinion very closely resembles the present case. There, in an action for personal injuries, the Master refused to order particulars of the loss of business mentioned in the statement of claim with dates and items. Baron Pollock in Chambers affirmed this order, and the defendants appealed. The Queen's Bench Division, consisting of Cave and Wills, JJ., allowed the appeal.

In the absence of other authority directly in point I do not hesitate on a matter of practice to refer to the views expressed in standard text-books. Thus in the Annual Practice, 1931, the following statement appears under the heading of *Special Damage :* " The plaintiff will not be allowed at the trial to give evidence of any special damage which is not claimed explicitly, either in his pleading or particulars. If special damage be claimed in the statement of claim, but not with sufficient detail, particulars will be ordered with dates and items."

Again in Mayne's Treatise on Damages it is stated that " As the object of stating special damage is to let the defendant know what charges he must prepare to meet, and to give him the opportunity of inquiring into the allegations of damage before he comes into Court, the statement must always be as full and specific as the facts will admit of."

Finally, in Bullen's and Leake's Precedents of Pleading (sixth edition) at p. 337, I find that in an action by a Passenger against a railway company for damages for personal injuries sustained in a collision, the particulars furnished include :—

Loss of fifteen weeks salary as clerk at £2 per week from .... 19....., to ...., 19.....	£30	0	0
Dr. Smith	10	10	0
Nurse for six weeks from .... 19.....	3	0	0
	£43	10	0

These authorities in our opinion point to the necessity of giving detailed particulars of claims in cases such as the present in order to prevent surprise at the trial, and the defendants are entitled to succeed in their application. If the plaintiff's claim is an honest one, I do not see how disclosing the fullest particulars can prejudice him; if it is dishonest it is the duty of the Court to give the defendants who are meeting it, every opportunity of having it investigated, before it comes into Court. As the case is admittedly now ready for trial, the plaintiff ought to be able to give the information required by the defendants; and the submission of the Attorney-General that the defendants could themselves get the particulars as to medical visits, charges, and expenses by writing direct to the plaintiff's doctors, is quite untenable.

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(1) 3 T.L.R. 273.

We feel it our duty to direct that further and better particulars should be given. As to the nature of such particulars, it is most convenient to refer to the particulars already furnished. The Court considers that under the heading of medical expenses it is not only reasonable but right that the names of the doctors, nurses, dentist, and masseurs in attendance should be given, and the dates of at least their first and last visits, the total number of visits paid, and the total charge made. Names, dates, and the total charge should also be given in regard to nursing homes, hospitals, and hotels; and in the matter of travelling expenses, the names of the persons for whom fares were paid and the dates should be included. As to expenses for extra domestic duties, the names of the extra servants, the dates between which they were employed, and the wages paid, should be supplied.

The Court also considers that the total amount claimed in respect of plaintiff's alleged absence from business and in regard to loss of commission should be set out; and, having regard to the terms of plaintiff's agreement with his employers, the particulars should specify the loss of profit earned in the district, and the amount alleged to be due in regard to the plaintiff's alleged obligation to pay expenses in the event of a loss. The basis of calculation of each such amount must be given.

The defendants are entitled to their costs of the motion and of this appeal.

Solicitor for the appellants: *J. C. W. Rea.*

Solicitors for the respondent: *Martin H. Turnbull & Co.*

J. McC.

C.A.
1931.
Feb. 17.

BRADY v. McDONALD.
SMYTH v. McDONALD (1).

(1930. No. 4163.)

Practice—Separate actions for negligence arising out of the same accident—Order that actions be tried together as one action with separate issues as to damages and one set of trial costs—Jurisdiction of Court of Appeal.

Two plaintiffs brought separate actions, in respect of the deaths of their respective husbands, against the defendant for damages caused by his negligence in the driving and management of a motor car. Both actions arose out of the same accident. The plaintiffs were represented by different solicitors. An application was made on behalf of the defendant to the King's Bench Division, that the actions should be consolidated or, alternatively, that they should be tried together as one action, with separate issues as to damages.

Moore, L.C.J., made an order that the actions should be tried together before the same Judge and Jury with separate relative issues. The defendant appealed to the Court of Appeal.

Held, by the Court of Appeal (Andrews and Best, L.JJ.) that the order of the Lord Chief Justice should be varied to the extent that the actions should be tried together as one action with separate issues as to damages and, that in the event of the plaintiffs obtaining verdicts, one set of trial costs only should be allowed to them, such costs in default of agreement to be divided equally between them.

Appeal from an order of Moore, L.C.J., directing that two actions should be tried together before the same judge and jury with separate relative issues.

On the 7th November, 1930, the defendant was driving a motor car in which John P. Brady and Edward Smyth were travelling at the defendant's invitation, on the main road between Armagh and Portadown. The motor car while driven by the defendant collided with a wall adjoining the roadway and John P. Brady and Edward Smyth were thrown out and killed.

Two separate and independent actions were commenced by Mary Ellen Brady and Mary Smyth, the respective widows of John P. Brady and Edward Smyth against the defendant for negligence in the management of the motor car. The plaintiffs alleged that their husbands' deaths were caused by the negligent driving of the defendant. The two plaintiffs were represented by different solicitors. An application was made on behalf of the defendant to the King's Bench Division, asking that the actions should be consolidated, or, alternatively, that they should be tried together as one action, with separate issues as to damages.

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(1) In the Court of Appeal before Andrews and Best, L.JJ.

Moore, L.C.J., made an order that the actions should be tried together before the same judge and jury with separate relative issues. The defendant appealed to the Court of Appeal.

Murphy, K.C., (with him *Ellison*), for the defendant and appellant :—

There is no such rule as that when two plaintiffs are represented by different solicitors the actions should not be tried together as one action. It would be impossible to carry out this order as it stands.

McGonigal, K.C., and *Beattie, K.C.*, (with them *McSparran*) for the plaintiffs :—

We submit that the question is one entirely for the discretion of the Court.

In *Mann v. Catherwood* (1) the Court in their judgment held that they would not consolidate running down actions. (Murphy, K.C. :—I appeared in that case and all the Court decided was that they would not consolidate those particular actions.] The Chief Justice has exercised his discretion. The application that the two actions should be consolidated has been abandoned, and the matter becomes one either of consent or discretion. There being no consent, nothing remains but discretion.

(1) Unreported.

Our client is entitled to have her own solicitor. We submit that the discretion exercised by the learned Lord Chief Justice should stand.

Murphy, K.C., (in reply):—

The actions are, except as to damages, admittedly identical.

ANDREWS, L.J., delivered the judgment of the Court as follows:—

ANDREWS. L.J.

We have come to the conclusion that the order of the Lord Chief Justice should be varied. The matter came before him on an application by the defendant that the actions be consolidated, or, alternatively, that they be tried together as one action with separate issues as to damages. The Order of the Lord Chief Justice neither consolidated nor directed trial as one action. It provided that both actions "be tried together before the same Judge and Jury with separate relative issues." I am not certain if I fully appreciate what precisely was intended by the words "with separate relative issues," on which different meanings have been placed by Counsel; but it is at least clear that the Order preserved the separate and distinct identity of the two actions, and, accordingly, gave the defendant no relief in regard to the burden of costs to which, if unsuccessful, he would be liable.

There is no question that the issues in both actions are identical save in respect of damages.

Reliance has been placed by Counsel for the plaintiffs on *Mann v. Catherwood* (1) in which, it was alleged, this Court had set aside an Order of the Lord Chief Justice consolidating three actions arising out of one collision. I have looked up the Record. It is quite correct to say that we expressed the opinion that a consolidation of the actions was not the proper order to make, and this we re-affirm; but, as the appeal was brought by one of the plaintiffs only, we were unable to make any order which might affect the rights of other parties who were not before the Court. We,

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(1) Unreported.

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ANDREWS, L.J.

accordingly, merely discharged the order of the Lord Chief Justice as regards the appellant, so that his action might proceed to a separate trial.

We are of opinion that the proper order to make in this case is that the two actions should be tried together as one action with separate issues as to damages. We make this order by virtue of a general and inherent jurisdiction which has been so frequently exercised under the same Rules in the former High Court of Justice in Ireland and also, we believe, in these Courts that it cannot now be questioned.

It is not, however, to be understood that the order we are making in this case will necessarily be made in every case in which two or more plaintiffs have been injured in the same accident. It is possible that, although all the injuries were so received, different issues might arise, as for example, contributory negligence by the driver of a motor car, though none by a passenger in his car. It is also conceivable that even conflicting issues might arise which would make it prejudicial to one or both of the parties that they should be forced to litigate together in a common action. Other circumstances might also make it undesirable in any particular case that two or more actions should be tried as one action; but no such reasons or circumstances exist in the present case.

It has been urged on behalf of the plaintiffs that as they are represented by different solicitors, any order which compelled either of them to change his solicitor would effect a serious injustice. I gravely doubt if we have any power to compel a litigant to change his solicitor, and we do not so order. At the same time it is our duty to see that an injustice is not done to the defendant; and we, accordingly, direct that, in the event of the plaintiffs obtaining verdicts, one set of trial costs only should be allowed to the plaintiffs, such costs in default of agreement to be divided equally between them.

Solicitor for the plaintiff: *George Martin.*

Solicitors for the defendant: *W. G. Wilson & Sons.*

J. McC.

McILVENNY v. McKEEVER (1).

(1930. No. 1550.)

C.A.
1931.

Jan. 26, 27.
March 11.

Landlord and Tenant—Lease—Forfeiture for Breach of Covenant—Waiver of Forfeiture by acceptance of rent—Continuing Breach—Validity of Notice—Sufficiency of period allowed to have breach remedied—Merger—Intention—Relief against Forfeiture—Conveyancing Act, 1881 (44 & 45 *Vic.*, c. 41), *s.* 14—*Landlord and Tenant Act* (*Ireland*), 1860 (23 & 24 *Vic.*, c. 154), *s.* 43.

By lease of 8th October, 1913, certain premises in B. were demised as a spirit grocery with goodwill, fixtures, and licenses, for the term of 9997 years, at the yearly rent of £35. The lease contained covenants on the part of the lessee and his assigns *inter alia* to use the premises as a spirit grocery and beer retailer's establishment only, and at all times during the term to apply for and endeavour to procure a renewal of the necessary licences, and it also contained a clause of re-entry on breach of covenant.

The lessee's interest in the lease was assigned to the plaintiff on 2nd November, 1915, and on 13th June, 1918, the lessor's interest also became vested in him.

The defendant became possessed of the lessee's interest on 10th April, 1920. In January, 1924, the defendant was refused a renewal of the licence in connection with the premises under the provisions of the Northern Ireland Intoxicating Liquor Act, 1923, as he was carrying on another trade, grocery, in addition to his liquor trade on the premises. The liquor licence for the premises then lapsed, and owing to the provisions of the Intoxicating Liquor Act (Northern Ireland), 1923, it could not be renewed. On 3rd April, 1930, the plaintiff served a notice in writing on the defendant under section 14 of the Conveyancing Act, 1881, complaining of breaches of the covenants contained in the lease, to keep the premises in good repair, to keep them insured in accordance with the covenant, to maintain them as a spirit grocer's and beer retailer's establishment, and to do the acts necessary to renew the spirit grocer's and beer retailer's licences. It was alleged in the notice that the licences had been allowed to lapse by the default and neglect of the defendant, to the great damage of the reversion expectant upon the lease. The notice required that within three weeks of its service, the breaches complained of should be remedied, and that reasonable compensation should be made to the plaintiff.

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(1) In the Court of Appeal before Andrews and Best, L.JJ., and Brown, J.

On the 1st May, 1st August and 1st November following the service of the notice rent was paid to, and accepted by, the plaintiff.

On 6th May, 1930, the plaintiff issued a writ claiming possession of the premises, and damages for the breaches of covenant.

The action was tried before Moore, L.C.J., and a special jury and resulted in judgment for the plaintiff for possession of the premises, and £237 10*s.* 0*d.* damages for the breaches of covenant.

The defendant appealed to the Court of Appeal.

Held, by the Court of Appeal (Andrews and Best, L.JJ., and Brown, J.) (*a*) that the plaintiff having definitely exercised his option of relying upon the forfeiture, and having shown a final and unequivocal determination to take advantage of it by instituting proceedings in ejectment, the subsequent acceptance of rent by him could not operate as a waiver of the forfeiture, and that the breach being of a continuing character, waiver of the forfeiture up to a particular day could not be relied on as a defence to an action for ejectment in respect of a subsequent breach; (*b*) that the notice served under section 14 of the Conveyancing and Law of Property Act, 1881, sufficiently specified the particular breaches complained of, and that it was not invalidated because it specified breaches of covenant which were not made the subject of complaint in the action, nor because particulars of all the breaches were not specified; *Pannel v. City of London Brewery Co.* [1900] 1 *Ch.* 496, *and Fox v. Jolly* [1916] 1 *A. C.* 1 *followed ;* (*c*) that in the circumstances three weeks was a sufficient time to specify in the notice ; (*d*) that having regard to all the circumstances, and especially to the actions of the plaintiff in his dealings with the lease of 8th October, 1913, it could not have been his intention that merger should take place, and that the jury were fully justified in their finding that it was not intended that the two estates should be merged; (*e*) that the Court should exercise its discretion in favour of the defendant and grant him relief from the forfeiture (Andrews, L.J., doubting but not dissenting).

Motion on behalf of the defendant, Patrick McKeever, for an order that the judgment entered for the plaintiff on the trial of the action for possession of the premises known as 447 Falls Road, Belfast, and for £237 10*s.* 0*d.* for damages for the defendant's breach of covenant to use the premises as a spirit grocery and beer retailer's establishment only, and to maintain the licence attached to the premises, and dismissing the defendant's counterclaim, be set aside, and that it might be ordered that the action be dismissed with costs, or in the alternative that judgment be entered for the defendant on the counterclaim.

The grounds of the motion were that on the admitted facts as to waiver, judgment should have been entered for the defendant, that the Lord Chief Justice misdirected the jury on the question of merger, that the finding of the jury with reference to that question was without evidence and against the weight of evidence, and that the Lord Chief Justice misdirected himself in point of law, in holding that the notice served by the plaintiff under the Conveyancing and Law of Property Act, 1881, section 14, was a good notice. The defendant also asked that judgment should be entered for him on the counterclaim, in which he sought relief from forfeiture if it should be held that he had committed any breach of the covenant.

By an indenture of lease made the 8th October, 1913, Frances Sarah McIlvenny demised to Hugh Maguire, the premises already referred to, together with the goodwill of the grocery, and spirit grocery, and beer retailer's business then carried on there, and the spirit grocer's and beer dealer's licences attached, and the bar fittings and fixtures, for the term of 9997 years from the 1st August, 1913, at the yearly rent of £35, payable quarterly. The lessee covenanted for himself and his assigns with the lessor and his assigns to use the premises as a spirit grocery and beer retailer's establishment only, and at all times during the term to apply for and endeavour to procure a renewal of the necessary licences for using and keeping the premises open as a spirit grocer's and beer retailer's establishment. There was a clause of re-entry entitling the lessor and his assigns to enter upon the premises in case of the breach, non-performance, or non-observance of any of the covenants, other than those relating to the licence, and also in case of forfeiture or refusal to renew the licence, or in case it should lapse, or be extinguished by reason of the licensee or otherwise.

The lessee's interest in the lease was assigned to the plaintiff on 2nd November, 1915, and on 13th June, 1918, the lessor's interest also became vested in the plaintiff. The defendant became possessed of the lessee's interest on 10th April, 1920, in consideration of the payment of the sum of £1,250.

In January, 1924, the defendant was refused a renewal of the licence in connection with the premises under the provisions of The Intoxicating Liquor Act (Northern Ireland), 1923, as he was carrying on another trade, grocery, in addition to the liquor trade on the premises. The liquor licence for the premises then lapsed, and owing to the provisions of the Intoxicating Liquor Act (Northern Ireland), 1923, it could not be renewed, so that the premises ceased to be licensed.

On 3rd April, 1930, the plaintiff served on the defendant a notice in writing under section 14 of the Conveyancing and Law of Property Act, 1881, complaining of the following breaches of covenant, contained in the lease, viz. :—

(*a*) breach of covenant to keep the premises in good repair ;

(*b*) to keep them insured in accordance with the covenant ; and

(*c*) failure to maintain them as a spirit grocer's and beer retailer's establishment and to do the acts necessary to renew the spirit grocer's and beer retailer's licences, which, it was alleged, had been allowed to lapse by the default and neglect of the defendant as assignee of the lessee, to the great damage of the reversion expectant upon the lease.

The notice required that within three weeks of its service the breaches of covenant complained of should be remedied, and that reasonable compensation in money should be made to the plaintiff.

After service of the Notice the defendant paid to the plaintiff three quarterly payments of rent on the 1st May, 1st August, and 1st November, respectively. This rent was accepted by the plaintiff.

The action was tried before Moore, L.C.J., and a special jury of the City of Belfast, on 20th November, 1930. The Lord Chief Justice left two questions to the jury. These questions with their answers were as follows :—

(*a*) Francis McIlvenny got the lessee's interest on 2nd November, 1915, he got the lessor's interest (his mother's) on June 13th, 1918. Was it

intended that the two estates should be merged ?
Answer : No.

(*b*) Damages (if any) ? £237 10*s*. 0*d*.

The Lord Chief Justice gave judgment for the plaintiff for (*a*) possession of the premises, 447 Falls Road, Belfast, and (*b*) £237 10*s*. 0*d*. for damages for the defendant's breaches of covenants to use the premises as a spirit grocery and beer retailer's establishment only and to maintain the licence attached ; and (*c*) for costs of the action ; and he dismissed the defendant's counterclaim with costs.

Murphy, *K.C.*, and *McSparran* in support of the motion.

There is a difference between the present case and *Maguire v. Day* (1) on the question of waiver.

We submit that this is a clear case of merger. The present action is founded on the covenants in the lease of 1913. Here there is unity of interest, and reliance cannot be placed on covenants in a lease which has been merged in a head lease. We submit that from the time the plaintiff obtained the lessor's interest, it was neither his duty nor his interest to preserve the sub-lease from merger. Merger by operation of law should be presumed to have taken place.

As to the question of waiver, in *Matthews v. Smallwood* (2), Parker, J., said at p. 786, " waiver of a right of re-entry can only occur where the lessor, with knowledge of the facts upon which his right to re-enter arises, does some unequivocal act recognizing the continued existence of the lease. . . ." It is not open to a lessor who has knowledge of the breach to say, ' I will treat the tenancy as existing, and I will receive the rent, or I will take advantage of my power as landlord to distrain ; but I tell you that all I shall do will be without prejudice to my right to re-enter, which I intend to reserve.' That is a position which he is not entitled to take up. If knowing of the breach, he does distrain, or does receive the rent, then

(1) [1926] N.I. 80.

(2) [1910] 1 Ch. 777.

by law he waives the breach, and nothing which he can say by way of protest against the law will avail him anything." This is a clear statement of what is undoubted law in England. The plaintiff relies on section 43 of the Landlord and Tenant Act (Ireland). 1860. It is stated in *Cherry* on "the Irish Land Law and Land Purchase Acts" (third edition) at p. 83, that "in *Foott v. Benn* (1) Palles, C.B., expressed an opinion that this section merely applies to a general waiver of a covenant, and that a receipt of rent by a landlord after a breach of covenant, with knowledge of it, would still waive all rights of the Landlord arising from that particular breach, although it would not amount to a general dispensation of the covenant." This passage is we submit a clear intimation of the Lord Chief Baron's view and is of the highest authority.

In *Rex v. Paulson* (2), the Privy Council decided that the principle of law that a lessor who accepts rent knowing that there has been a breach of a covenant in the lease, thereby irrevocably elects to treat the lease as subsisting, and is precluded from claiming a forfeiture, is applicable although the lease provides that no waiver by the lessor shall take effect unless it is in writing. That was a very strong decision in a case where the words of the 43rd section of the Landlord and Tenant Act (Ireland), 1860, were incorporated in the actual contract. We submit that section 43 of this Act should not be given the wide interpretation and the wide effect contended for on behalf of the plaintiff. Apart from statute it must be admitted that the receipt of rent is a definite waiver. We submit (*a*) that on the authority of *Foott v. Benn* (1), the receipt of rent with knowledge is a definite waiver, (*b*) that the provisions of section 43 of the Landlord and Tenant Act (Ireland), 1860, do not put the landlord in a stronger position than express words in a mining lease did in *Rex v. Paulson* (2), (*c*) that on the words of The Intoxicating Liquor Act (Northern Ireland), 1923, and the Intoxicating Liquor and Licensing Act

(1) 18 I.L.T.R. 90.
(2) [1921] 1.A.C.271.

(Northern Ireland), 1927, the breach in this case is not a continuing one.

We submit that the notice served under section 14 of the Conveyancing and Law of Property Act, 1881, is bad, as, in addition to the breach regarding the licence, it specified breaches of covenant to repair and keep the premises in repair which were not complained of in the action. We rely on the judgment of Lord Russell, C.J., in *Horsey Estate, Ltd. v. Steiger* (1) on this point at page 92. The notice was defective because particulars of all the breaches complained of were not specified, see *Fletcher v. Nokes* (2), where it was held that the notice must be given in such detail as will enable the lessee to understand what is complained of, so that he may have an opportunity of remedying the breach before action brought.

We submit also that the notice was defective because three weeks is an insufficient time in which to require the breaches of covenant to be remedied and compensation made. *Walsh v. Wightman* (3) is, we contend, a clear authority in our favour.

We submit that this is a case in which the Court should exercise its discretion in favour of the defendant and grant him relief from the forfeiture.

(They also referred to *Jacob v. Down* (4), *In re Fletcher, Reading v. Fletcher* (5), *Griffin v. Tomkins* (6), *Strong v. Stringer* (7), *Croft v. Lumley* (8), *and Penton v. Barnett* (9).

Beattie, K.C., *McKean, K.C.* (with them *Copeland*) for the plaintiff.

On the question of waiver it has been suggested that *Foott v. Benn* (10) rules this case and that the dictum of Palles, C.B., means that a covenant can be dispensed with by acceptance of rent. This dictum does not mean what it has been represented to mean. Palles,

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(1) [1899] 2 Q.B. 79.
(2) [1897] 1 Ch. 271.
(3) [1927] N.I. 1.
(4) [1900] 2 Ch. 156.
(5) [1917] 1 Ch. 339.
(6) 42 L.T. 359.
(7) 61 L.T. 470.
(8) 6 H.L.C. 672.
(9) 67 L.J. (Q.B.) 11.
(10) 18 I.L.T.R. 90.

C.B., did not say that he had decided the question, he said in effect that it had been present to his mind. The words he used were : "I have frequently considered." He was only letting the question pass through his mind. *Foott v. Benn* (1) was not really a case of waiver, it did not decide that a receipt of rent after a breach of a covenant amounted to a waiver of all rights of the landlord arising from that particular breach, otherwise a new trial would not have been ordered.

Section 43 of the Landlord and Tenant Act (Ireland), 1860, is part of the statute law and must be observed. It does not matter whether the breach was a continuing one, or whether there was one breach or whether there were many breaches. *Foott v. Benn* (1) does not decide the present case, nor does the dictum of Palles, C.B.

Rex v. Paulson (2) is distinguishable from the present case, it is altogether different. The cases cited on this point on behalf of the plaintiff were cases which were construed without reference to any statute law. No Court can over-rule the plain terms of a statute. Waiver can only take place in a way defined by statute, that is in writing. The tenant cannot take advantage of any other form of waiver.

[Brown, J. : A solemn contract between two parties is just as sacred a thing as an Act of Parliament.]

Section 43 prescribes the only way in which waiver can take place.

On the question of continuing breach we submit that the use of the word "only" has the effect of making as it were two covenants, (*a*) a positive covenant to use the premises in a particular way, and (*b*) a negative covenant not to use them in any other way. The receipt of rent makes no difference in the case of a "continuing breach." In *Doe v. Woodbridge* (3), a case of an ejectment for a forfeiture incurred by using

(1) 18 I.L.T.R. 90.

(2) [1921] 1 A.C. 271.

(3) 9 B. & C. 377.

rooms in a house in a manner prohibited by the lease, it was held that such user was a continuing breach, and that the landlord was not, by receiving rent, precluded from taking advantage of the forfeiture, provided the user continued after such receipt of rent. In *Civil Service Co-operative Society, Ltd. v. McGrigor's Trustee* (1), it was held, that the demand for and acceptance of rent accrued due partly after the bankruptcy and partly after the issue of the writ did not operate as a waiver of the forfeiture.

All that *Rex v. Paulson* (2) decided was that a clause as to waiver contained in a particular lease was not applicable under all the circumstances. In delivering the judgment of the Privy Council, Lord Atkinson said, "it may well be that many cases may occur to which the clause as to waiver would be applicable."

As to the question of the validity of the notice, it was held in *Pannell v. City of London Brewery Company* (3) that a notice under section 14 of the Conveyancing Act, 1881, referring to several distinct alleged breaches of covenant is not invalidated *in toto* because it turns out that although some of the alleged breaches have occurred the others have never taken place, or that the lessor is not entitled to rely on them. Reliance was placed on behalf of the defendant on a passage from the judgment of Lord Russell, C.J., in *Horsey Estate, Ltd., v. Steiger* (4) at p. 92, in support of the argument that the notice is bad because in addition to the breach regarding the licence, it specified breaches of covenant which were not complained of in the action. This passage was, however, explained by Buckley, J., in *Pannell v. City of London Brewery Company* (5).

If the two cases are inconsistent, we submit that *Pannell v. City of London Brewery Company* (5) should be followed. In *Fox v. Jolly* (6), Lord Buckmaster, L.C., after referring to *Pannell v. City of London Brewery Company* (5), "where it was decided that a notice which specified two breaches and something else

(1) [1923] 2 Ch. 347.
(2) [1921] 1 A.C. 271.
(3) [1900] 1 Ch. 496.
(4) [1899] 2 Q.B. 79, 92.
(5) [1900] 1 Ch. 496, 502, 503.
(6) [1916] 1 A.C. 1.

which was not a breach was none the less good since the breach complained of had been specified together with the addition of something which was immaterial," said, "I regard this view as the correct interpretation of the section." We submit that if *Pannell v. City of London Brewery Company* (1) was rightly decided the notice in the present case is perfectly good.

We submit that the breaches complained of were specified with sufficient particularity, and on this point we rely on the judgment of Lord Buckmaster, L.C., in *Fox v. Jolly*, (2) at p. 13. We also submit that the period of time specified in the notice to allow the breaches to be remedied and compensation made was reasonable.

Merger depends on intention, as the jury were told by the Lord Chief Justice. The jury were asked if it was intended that the two estates should be merged, and they answered this question of fact in favour of the plaintiff. We submit that there was evidence on which they could so find. On this question of intention, we rely on *In re Fletcher, Reading v. Fletcher* (3), and especially on the words used by Lord Cozens-Hardy, M.R., at pp. 341, 342.

We submit that the defendant is not entitled to relief from forfeiture. We rely on the statements of the principles on which relief from forfeiture should be granted contained in the judgments in *Rose v. Spicer, Rose v. Hyman* (4) and in *Hyman v. Rose* (5).

McSparran (in reply):—

The reasoning applied by the Court in *Maguire v. Day* (6), should be applied in the present case, if that were done the defendant would not be liable either to forfeiture or damages. In the present case the covenant was broken once and for all. The words of the covenant in the present case are entirely and vitally different from the words in the covenant in *Maguire v. Day* (6). In *Griffin v. Tomkins* (7), it was held that the plaintiff's

(1) [1900] 1 Ch. 496, 502, 503.

(2) [1916] 1 A.C. 1, 13.

(3) [1917] 1 Ch. 339, 341, 342.

(4) [1911] 2 K.B. 234,

(5) [1912] A.C. 623.

(6) [1926] N.I. 80.

(7) 42 L.T. 359.

waiver of the breach of the covenant not to permit or suffer to be used, exercised, or carried on upon the premises, any trade, profession, or business, without the consent in writing of the lessor, by receipt of rent was sufficient to render proceedings to recover the premises ineffectual.

In the present case, the covenant ceased to exist after the passing of the Intoxicating Liquor Act (Northern Ireland), 1923, as it was impossible to observe it.

We submit that this is a case in which the Court should exercise its discretion in favour of the defendant, and grant him relief from the forfeiture.

Cur. adv. vult.

ANDREWS, L.J.
March 11.

ANDREWS, L.J. : This is an action for possession of certain premises grounded on alleged forfeiture by breach of covenant. The plaintiff also claims damages. The defendant's answer to the claim is threefold :—

(*a*) That the plaintiff waived the forfeiture by acceptance of rent ;

(*b*) That the Notice served under section 14 of the Conveyancing Act, 1881, was bad ; and

(*c*) That prior to the assignment by the plaintiff to the defendant's predecessor in title of the leasehold interest in the premises such interest had merged in the reversion, that the defendant held as a mere tenant from year to year from the plaintiff, and was not bound by the covenants in the lease.

This lease, dated the 8th October, 1913, demised the premises together with the goodwill of the business of a grocer and spirit grocer and beer retailer and the licences attached to the premises for the term of 9997 years at a yearly rent of thirty-five pounds ; and the lessee covenanted to use the premises as a spirit grocery and beer retailer's establishment only ; not to do or suffer any act whereby the licences for using the premises as a spirit grocer's and beer retailer's establishment might be liable to forfeiture or to have a conviction recorded thereon or the renewal thereof withheld ; and at all times during the term to apply for or endeavour to procure a renewal of the necessary licences for using and keeping the premises open as a spirit grocer's and beer retailer's establishment.

After the passing of the Intoxicating Liquor Act (Northern Ireland), 1923, which made it unlawful for any licensed person to carry on any other trade on the premises, the defendant elected to carry on the trade of a grocer. He thereupon applied for compensation under the Act for loss of his licence, which was assessed at £1,621.

Dealing first with the defence of waiver, it is well recognised that Courts of law have always leant against forfeiture. (Per Lord Mansfield in *Goodright d. Walter v. Davids*, at p. 805) (1). They have, accordingly, readily held that an alleged forfeiture has been waived if the lessor, with full knowledge of the breach of covenant or condition relied upon, has by some positive unequivocal act recognised the continued existence of the tenancy at a period subsequent to such breach. Acceptance of rent accruing due after the forfeiture, an action for same, and even an unqualified demand for such rent, have been held to constitute such waiver, notwithstanding the lessor's protest that he was acting without prejudice to his right to insist on a prior forfeiture. *Davenport v. The Queen* (2).

To this general proposition regarding waiver of forfeiture there are, however, at least two exceptions or qualifications. The first is that when once a landlord has definitely exercised his option of relying upon the forfeiture and has shown a final and unequivocal determination to take advantage of it by instituting proceedings in ejectment, no subsequent act, whether receipt of rent or otherwise, will be held to operate a waiver. *Evans v. Enever* (3), and *Civil Service Co-operative Society, Ltd. v. McGrigor's Trustee* (4), may be referred to as two recent authorities in which this principle was fully recognised and applied.

The second is that where the breach is, as in the present case, of a continuing character, waiver of the forfeiture up to a particular day cannot be relied upon as a defence to an action for ejectment in respect of a subsequent breach. The reason for this is simply that, as there is a continually recurring cause of forfeiture, a new right arises each day that the breach continues, and the landlord's waiver of a prior right cannot prejudice him or preclude him from taking advantage of a new and subsequent right. It has further been held—and this is material on the facts of the present case—that the mere acceptance of rent which becomes due pending a notice to repair is no waiver of a subsequent forfeiture occasioned by non-compliance with such notice. *Doe d. Rankin v. Brindley* (1), *Doe d. Baker v. Jones* (2), and *Penton v. Barnett* (3), decided that in the case of a continuing breach a second notice need not be given in respect of non-repair existing after the expiration of the time specified in the notice, for the breaches during the latter period are the same as those in respect of which the notice was given.

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(1) 2 Cowp. 803, 805.
(2) 3 A.C. 115.
(3) [1920] 2 K.B. 315.
(4) [1923] 2 Ch. 347.

In my opinion these considerations are sufficient to determine the issue of waiver in the present case in favour of the plaintiff. Each day that the defendant continues to use the premises in any other manner than as provided in the lease a new breach arises, and, accordingly, a new right of forfeiture. Thus, even if it be admitted that acceptance of the rent due on 1st May, 1930, amounted in law to a waiver of the plaintiff's rights up to that date, a new right had arisen and existed when the writ was issued in this action on 6th May. This right was not prejudiced by the plaintiff's subsequent acceptance of rent on 1st August and 1st November, as he had made his definite election to enforce the forfeiture on 6th May.

It would not be right, however, that I should pass from this question of waiver without referring to the fact that, independently of the above considerations, the plaintiff's counsel relied strongly on the provisions of section 43 of Deasy's Act (23 & 24 Vict. C. 154) as a complete answer to the allegation of waiver. This, he contended, is a statutory enactment applicable to all leases (such as the lease in the present case) made after 1st January, 1861, which provides that there can be no waiver unless it be in writing. To this the defendant's counsel made a two-fold reply. In the first place he relied upon the observation of Palles, C.B., made during the course of the argument in *Foott v. Benn* (1), in which, as reported, he undoubtedly suggests that section 43 applies merely to a waiver of the covenant generally, and that a receipt of rent after the breach, with knowledge of it, would still waive all rights of the landlord arising from that particular breach, although it would not amount to a dispensation of the covenant. It is strange that this limited operation of the section does not seem to have been considered in any subsequent reported case; but a passage in the judgment of Cherry, L.J., in *Midleton v. Wallis* (2), (at p. 42),though not specifically referring to it, appears to me to be at variance with it. See also the judgment of Whiteside, L.C.J., in *Earl of Donoughmore v. Forrest* (3) (at pp. 474-5), and *Taylor on evidence*, 11th Edit., vol. 1, p. 547. It is unnecessary, however, to determine in the present case whether the restricted operation of the section suggested by the Lord Chief Baron is well founded, as that view admits the necessity for writing in the case of a general waiver or dispensation of a covenant; and nothing short of such general waiver would avail the defendant in the present case because of the continuing nature of the covenant and of its breach already referred to.

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(1) 4 B. & Ad. 84.
(2) 5 Ex. 498, 505.
(3) [1898] 1 Q.B. 276.

The defendant's second answer to section 43 is *Rex v. Paulson* (4). It was there held by the Privy Council that the principle that a lessor who accepts rent, knowing that there has been a breach of a covenant in the lease, thereby irrevocably elects to treat the lease as subsisting and is precluded from claiming a forfeiture, applies even though the lease provides that

(1) 18 I.L.T.R. 90.
(2) [1914] 1 I.R. 35, 42.
(3) I.R. 5 C.L. 443, 474, 475.
(4) [1921] 1 A.C. 271.

no waiver by the lessor shall take effect unless it is in writing. As it is unnecessary for me to do so, I refrain from expressing any opinion as to whether the principle underlying that decision could be extended from the provisions of a lease so as to permit the waiver of the requirements of a public statute.

The validity of the Notice required by section 14 of the Conveyancing Act, 1881, specifying the breach of covenant complained of is challenged on several grounds. In the first place, it is said to be bad because, in addition to the breach regarding the licence, it specified breaches of covenant to repair and to keep the premises insured which were not made the subject of complaint in the present proceedings.

A passage from the Court of Appeal judgment of Lord Russell, C.J., in *Horsey Estate, Ltd. v. Steiger* (1) (at p. 92), is relied upon in support of the argument; but this passage is explained by Buckley, J., in *Pannell v. City of London Brewery Co.* (2) (at pp. 502-3). If there is any conflict between the two cases, I unhesitatingly accept the reasoning of the latter case in which it was held in the clearest terms that a notice under section 14 referring to several breaches is not invalidated *in toto*, because some of them never took place and have to be abandoned. I am fully justified in accepting the judgment of Buckley, J., in preference to the decision of the Court of Appeal by the fact that Lord Buckmaster, L.C., in *Fox v. Jolly* (3) (at p. 15), after referring to *Pannell v. City of London Brewery Co.* (4), said that he regarded this view as the correct interpretation of the section.

It is further submitted on the authority of *Fletcher v. Nokes* (5), that the Notice is defective because particulars of all the breaches complained of are not specified. This case is also interpreted and must be read in the light of the judgment of Lord Buckmaster, L.C., in *Fox v. Jolly* (3) (at p. 13); and when so viewed there can be no doubt in my opinion as to the sufficient particularity of the Notice.

(1) [1899] 2 Q.B. 79, 92.
(2) [1900] 1 Ch. 496, 502, 503.
(3) [1916] 1 A.C. 1.
(4) [1900] 1 Ch. 496.
(5) [1897] 1 Ch. 271.

Lastly, it was contended that three weeks was an insufficient time in which to require the breaches to be remedied and compensation made. I dealt with this question in *Walsh v. Wightman* (1) and need not repeat what I there stated as to the necessity for giving a reasonable time; but in my opinion there is nothing unreasonable in the present case when it is borne in mind that the breaches of covenant in regard to the licence were incapable of being remedied as the licence was gone and could not be renewed; and a period of three weeks was quite a fair and reasonable time in which to negotiate for payment of compensation. All the points raised against the validity of the Notice accordingly fail.

On the question of merger I have no difficulty. The Lord Chief Justice told the jury that merger was a question of intention and that the lessee's interest was treated as alive. The jury were, accordingly, asked if it was intended that the two estates should be merged, to which they answered "No." Was there anything either in the learned Judge's charge or in the finding of the jury which cannot be supported?

At law when two estates—a greater and a less—became vested in the same person and in the same right without any intermediate estate between them, the lesser estate merged as a necessary consequence in the greater, wholly irrespective of any question of intention. But equity has long since relaxed the rigour of the law and has looked to the intention, either actual or presumed, of the person in whom the interests have become united. The Judicature Act (Ireland), 1877, section 28 (4), removed the legal and equitable conflict by providing that there should not after the commencement of that Act be any merger by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity. This enactment is identical in terms with the English Judicature Act, 1873, section 25 (4), which has been considered in several cases, but of these it is unnecessary in my opinion to refer to more than two.

(1) [1927] N.I. 1, 11.

The Capital and Counties Bank, Ltd. v. Rhodes (1), laid it down in the clearest terms that the equitable rule that merger depends upon intention applies to the merger of estates as well as to the merger of charges. In his judgment, Cozens Hardy, L.J. (at p. 652), after pointing out that Courts of Equity had regard to the intention of the parties, states that in the absence of any direct evidence of intention, such Courts presumed that merger was not intended if it was to the interest of the party or only consistent with the duty of the party that merger should not take place. The same learned Judge, then Master of the Rolls, in *In re Fletcher, Reading v. Fletcher* (2) (at pp. 341-2), cited the above passage and continued :—" But it was not " the law of the Courts of Equity that merger took " place only if an intention could be established that it " should take place. The common law doctrines " prevailed if nothing more was known. Intention " might be established by means of an expressed intention at the time. The declaration of intention " might be verbal. If not substantially at the time, " what would be the effect of a declaration made some " time afterwards, say, twelve months afterwards ? " Such a declaration could not be rejected as inadmissible, though its weight might be slight." On the facts, the Master of the Rolls held that a recital in a Mortgage of October, 1915, as to the then existence of separate interests and the general form of the deed was admissible as evidence not only that the mortgagors then believed there was no merger but that such was their intention in the previous December, when, being already owners of the reversion in fee, they took an assignment of the leasehold interest.

When we look at the Deeds in the present case it seems to me that the same conclusion as to intention against merger is irresistible. The assignment of 13th June, 1918, under which the plaintiff acquired the lessor's interest, contains no reference to the lease of 8th October, 1913, and there is accordingly no

(1) [1903] 1 Ch. 631.
(2) [1917] 1 Ch. 339.

declaration of intention that the leasehold interest should merge in the reversion. More important still is the fact that eight months later—on 11th February, 1919—the plaintiff in consideration of the sum of £400 assigned the premises to one Edward McConville for the residue then unexpired of the said term of 9997 years created by the lease of 8th October, 1913, which was recited as a validly subsisting lease. Subsequently on 10th April, 1920, McConville by an assignment of similar form sold the same leasehold interest to the defendant for the sum of £1,250. I cannot understand how, in face of these documents and in the absence of any evidence to the contrary, it can be seriously contended by the defendant that he does not hold under the lease of 8th October, 1913. His submission that he holds the premises under some sort of yearly tenancy free from all covenants in regard to the licence is not founded on any legal principle and is in my opinion utterly untenable.

The only other point to be considered is the defendant's application by way of counterclaim for relief against forfeiture. I feel great difficulty in interfering with the discretion of the learned Lord Chief Justice who declined to accede to the application; and as the breach of covenant is of a continuing character and incapable of remedy it is in my opinion difficult to reconcile relief with the principles enunciated in *Rose v. Spicer* and *Rose v. Hyman* (1), and *Hyman v. Rose* (2). My colleagues, however, are so clearly of opinion that such relief should be given that I am not prepared to dissent from their judgment, provided the defendant pay the damages awarded by the jury within one month from this date, and provided he also pay the plaintiff's costs of action, including the costs of this motion which we award, within one month from the date of the certificate of taxation.

Best, L.J.

Best, L.J.: This is an appeal by the defendant from the Order of the Lord Chief Justice made on the trial of the action whereby judgment was entered for the plaintiff for possession of the house, shop and premises known as 447 Falls Road, in the city of Belfast, and for £237 10*s.* 0*d.* for damages for the defendant's breach of covenant to use the said premises as a spirit grocery and beer retailer's establishment only and to maintain the licence attached thereto.

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(1) [1911] 2 K.B. 234.

(2) [1912] A.C. 623.

The grounds of appeal are that on the admitted facts as to waiver, judgment should have been entered for the defendant, that the learned Lord Chief Justice misdirected the jury on the question of merger, that the finding of the jury in answer to that question was without evidence and against the weight of evidence, and further that the Lord Chief Justice misdirected himself in point of law in holding that the notice served by the plaintiff under the Conveyancing and Law of Property Act, 1881, section 14, was a good notice ; and defendant also asks that judgment should be entered for him on the counterclaim, in which he sought relief from forfeiture if it should be held that he had committed any breach of the covenant.

By an indenture of lease made the 8th day of October, 1913, one Frances Sarah McIlvenny demised to Hugh Maguire the house, shop and premises in question, together with the goodwill of the business of a grocer and spirit grocer and beer retailer then carried on therein and the spirit grocer's and beer retailer's licences attached thereto and the bar fittings and fixtures, for the term of 9997 years from the 1st day of August, 1913, at the yearly rent of £35 payable quarterly. By the said indenture the lessee covenanted for himself and his assigns with the lessor and his assigns to use the said messuage and buildings as a spirit grocery and beer retailer's establishment only, and at all times during the said term to apply for and endeavour to procure a renewal of the necessary licences for using and keeping the premises open as a spirit grocer's and beer retailer's establishment, with a clause of re-entry entitling the lessor and his assigns to enter upon the said house and premises in case of the breach, non-performance, or non-observance of any of the covenants other than those relating to the licence, and as regards the licence, in case of its forfeiture or refusal to renew same, or any lapse or extinguishment of same by reason of the default of the licensee or otherwise.

The estate and interest of the lessor are now vested in plaintiff, and of the lessee in the defendant.

On the 3rd day of April, 1930, plaintiff served on the defendant a notice in writing complaining of the following breaches of covenant contained in the said lease, viz. :—

(*a*) breach of covenant to keep the premises in good repair ;

(*b*) to keep them insured in accordance with the covenant ; and

(*c*) failure to maintain them as a spirit grocer's and beer retailer's establishment and to do the acts necessary to renew the spirit grocer's and beer retailer's licences, which it was alleged had been allowed to lapse by the default and neglect of the defendant to the great damage of the reversion expectant upon the lease ;

and the notice required that within three weeks of its service the breaches complained of should be remedied and that reasonable compensation for said breaches should be made to the plaintiff. The sufficiency of this notice was impeached, particularly as the only breaches alleged in the statement of claim and sued for in the action were failure to use the premises as a spirit grocer's and beer retailer's establishment only and using them for other purposes, and failure to apply for or endeavour to procure the necessary licences for using and keeping open the premises as such establishment and for permitting the forfeiture of such licences.

It was proved that defendant in January, 1924, failed to obtain a renewal of the licence attached to the premises by reason of the fact that he carried on therein a trade other than the sale of intoxicating liquors or of table waters, and it is admitted that such failure was caused by an act of the defendant, and that after that date it was no longer possible to renew the licence or to carry on the spirit grocer's business in the premises. These are the breaches complained of.

The defendant, as he was entitled to do under the Intoxicating Liquor Act (Northern Ireland), 1923, claimed compensation for the loss of the licence and of the profits resulting therefrom and was awarded the sum of £1,621 in respect thereof.

The defences relied on were that plaintiff, with full knowledge of the facts, had accepted all rent due up to the institution of the action, and had thereby waived his right to forfeiture or to damages, and that by reason of certain acts set out, plaintiff became and was the owner of the leasehold reversion in the said premises and also of the lessee's interest therein under the lease of 8th October, 1913, with the result that such interest merged in the leasehold reversion, and that the covenants pleaded were not binding on the defendant.

I think it convenient to deal with the questions in the following order, viz., merger, notice and waiver.

On the subject of merger the following question was put to the jury:—

> Francis McIlvenny got the lessee's interest on the 2nd November, 1915. He got the lessor's interest (his Mother's) on June 13th, 1918. Was it intended that the two estates should be merged ? Answer : No.

It may be stated here that the only other question submitted was : Damages, if any ? And the answer was : £237 10*s.* 0*d.*

On the 2nd day of November, 1915, the lessee's interest in the lease of the 8th day of October, 1913, was assigned to plaintiff, and on the 13th day of June, 1918, Frances Sarah McIlvenny conveyed to plaintiff (inter alia) the premises the subject matter of this action to hold the same unto and to the use of the said plaintiff his heirs and assigns for ever.

Defendant contends that the effect of these two transactions was to merge the former interest in the latter and that the merger was of full force and effect on the 11th day of February, 1919.

By indenture of that date made between plaintiff of the one part and Edward McConville of the other part, after reciting the lease of the 8th day of October, 1913, made between Frances Sarah McIlvenny and Hugh Maguire, and reciting the assignment of the 2nd day of November, 1915, already mentioned whereby the premises comprised in the lease were assigned to the plaintiff, the plaintiff as beneficial owner assigned unto the said Edward McConville the hereditaments and premises comprised in and demised by the said indenture of lease of the 8th day of October, 1913, to hold unto the said Edward McConville his executors etc., for the residue unexpired of the said term of 9997 years from the first day of August, 1913, subject to the payment of the yearly rent of £35 reserved by and to the performance and observance of the covenants on the part of the lessee and conditions contained in said indenture of lease and henceforth to be paid, performed and observed, and there are the usual covenants by the said Edward McConville to pay the rent and observe the other covenants and to indemnify and save harmless the plaintiff from the breach or non-performance of any such covenants.

It appears to me that plaintiff in the most explicit manner possible in this indenture of 11th February, 1919, recognized the existence of the lease of 8th October, 1913, and treated it as a subsisting lease and regarded the estate created by it as separate from and wholly independent of the estate that had been vested in him by the indenture of the 13th day of June, 1918.

Lord Cozens-Hardy, M.R., in the case of *In re Fletcher, Reading v. Fletcher* (1), at p. 341 of the Report says: "A Court of Equity had regard to the intention "of the parties and to the duty of the parties. In the "absence of direct evidence of intention, the Court "presumed that merger was not intended if it was to "the interest of the party, or only consistent with his "duty that merger should not take place. But it was "not the law of the Courts of Equity that merger took "place only if an intention could be established that "it should take place. The Common Law doctrines "prevailed if nothing more was known."

The Judicature Act, section 28, sub-section 4, provides that there is no merger in law if not in equity, and merger in equity is based on intention, and it is only in cases where the intention cannot be discovered that the question is determined by duty or interest.

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(1) [1917] 1 Ch. 339.

In my opinion the actions of the plaintiff in his dealings with the lease of the 8th day of October, 1913, afford ample proof of his intention that merger should not take place. The answer of the jury to question No. 1 is, accordingly, I think, fully justified.

The next point taken for the defendant is on the notice of the 3rd day of April, 1930, which specified the breaches then complained of, and Mr. Murphy contends that it is bad because, whilst three different sets of breaches are specified, only one is subsequently sued for, and his proposition appears to be that a notice specifying various breaches is bad unless in the proceedings which may be taken and which are based upon the notice, reliance is placed on each and every breach which has been inserted in the notice. As authority for this proposition he relies on the case of *Horsey Estate, Ltd. v. Steiger* (1). In the notice served in this case two breaches—one of non-repair and the other that the Company had gone into liquidation—were specified and the learned Lord Chief Justice (Russell) says he thinks on the whole that the notice was not good but he goes on to say that only two days' notice was given before action brought and that this could not be said to be a reasonable notice in the circumstances. I think the real ground of the decision as to the sufficiency of the notice was not the fact that two breaches were complained of and only one—the liquidation—was made the subject of proceedings, but that insufficient time was given to allow of amends being made by the defendant.

This appears to be the view of the case taken by Buckley, J., in *Pannell v. City of London Brewery Co.* (2), which decides that a notice under section 14 referring to several distinct alleged breaches of covenant is not invalidated *in toto* because it turns out that, although some of the alleged breaches have occurred, the others have never taken place.

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(1) [1899] 2 Q.B. 79.
(2) [1900] 1 Ch. 496.

If want of repair had been insisted on and sued for in the present action, a question might in that event have been properly raised on the sufficiency of the notice as it did not specify any particulars of non-repair. On the whole I am satisfied that in the circumstances of this case the notice was good.

The breaches of the lessee's covenants complained of are :—

(*a*) failure to use the demised premises as a spirit grocer's and beer retailer's establishment only and the use of them for other purposes ; and

(*b*) the not applying for or obtaining a renewal of the necessary licences for using and keeping the premises open as such spirit grocer's and beer retailer's establishment, with the consequent forfeiture of such licences.

Failure to use the premises as " a spirit grocer's and beer retailer's establishment only " began when in January, 1924, the necessary licences were not renewed, and that failure has continued up to the present moment. There is accordingly a continuing breach of the covenant to use the premises as such establishment notwithstanding the fact that it is no longer in the power of the defendant so to use them. Without deciding, therefore, what the effect of the receipt of rent by the landlord up to 30th April, 1930, has had upon his rights, I am of opinion that he can take advantage of the breach of this covenant on each of the days between that date and the 6th day of May, 1930, when the writ was issued.

The bringing of the action for ejectment is an unequivocal act by which the lessor has expressed his election to treat the lease as determined, and the subsequent receipt by him of the gales of rent due on 31st July and 31st October, 1930, cannot operate as a waiver so as to revive the lease. *Jones v. Carter* (1). Those gales of rent are expressed to be received " without prejudice " and in my view their acceptance does not get rid of the election which plaintiff made by bringing his action. Having arrived at this con-

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(1) 15 M. & W. 718.

Best, L.J.

clusion, it becomes unnecessary for me to express any opinion on the construction of section 43 of Deasy's Act (23 & 24 Vic. C. 154) or as to the soundness of the dictum of Palles, C.B., in *Foott v. Benn* (1), at p. 91, and I refrain from doing so.

Having regard to all the circumstances and particularly to the fact that the lessor lay by for upwards of six years after the breach of the covenant to renew the licences had occurred, which breach made it impossible for defendant to perform the covenant as to the use of the premises, and in conformity with the principle that the Courts lean strongly against forfeiture, this is a case in which in my judgment the Court should exercise its discretion in favour of the defendant, and grant him relief from the forfeiture.

The defendant will, of course, have to pay the costs of the trial and the damages awarded as well as the costs of the appeal.

Brown, J.

Brown, J.: This is an appeal by the defendant from a judgment for possession of certain premises known as 447 Falls Road, Belfast. By lease of the 8th October, 1913, the premises were demised as a "spirit grocery" with goodwill fixtures and licences for the term of 9997 years at the yearly rent of £35. The lease contained covenants on the part of the lessee and his assigns *inter alia*—

(*a*) To use the said premises as a spirit grocery and beer retailer's establishment only, and

(*b*) At all times during the said term to apply for and endeavour to procure a renewal of the necessary licences for said use.

The lease also contained a clause of re-entry on breach of covenant.

The lessee's interest in this lease was assigned to plaintiff on 2nd November, 1915, and on 13th June, 1918, the lessor's interest also became vested in the plaintiff. The defendant became possessed of the lessee's interest on 10th April, 1920, in consideration of the sum of £1,250. In January, 1924, the defendant was refused a renewal of the licence in connection with the said premises under the provisions of the Northern Ireland Intoxicating Liquor Act, 1923, as he was carrying on another trade—grocery, in addition to his liquor trade on the said premises. The liquor licence for the said premises then lapsed, and in the present state of the Intoxicating Liquor Laws in Northern Ireland it cannot be renewed, so that the premises are no longer licensed premises. On 3rd April, 1930, the plaintiff served on the defendant a notice under section 14 of the Conveyancing Act, 1881, specifying *inter alia* the breach of covenants set out above and on 6th May, 1930, issued his writ for possession and damages. The case was tried before the Lord Chief Justice and a special jury and resulted in judgment for the plaintiff for possession of the premises and £237 10*s*. 0*d*. damages.

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(1) 18 I.L.T.R. 90.

The defendant appeals against this judgment and asks us to reverse it and enter judgment for him on three grounds :—

(*a*) That the breach of covenant was waived by the plaintiff by the acceptance of rent after full knowledge of the breach ;

(*b*) That the notice under section 14 of the Conveyancing Act was bad ; and

(*c*) That prior to the purported assignment to the defendant's predecessor in title the lessee's interest had merged in the leasehold reversion.

In any event the defendant asks for relief from the penalty of forfeiture.

The case has been argued by Counsel on both sides under these heads : waiver, notice, merger and relief, and I propose to deal with these points in the same order.

It is admitted that after full knowledge of the breach, the landlord continued to receive the rent and it is submitted by the defendant that there is, therefore, a waiver of the breach. In England I think this submission would be sound ; but in Ireland a change was made in the law by the forty-third section of Deasy's Act. This section is twofold in its application, (*a*) to a dispensation with a covenant and (*b*) to a waiver in respect of any breach of a covenant, and provides that such dispensation or such waiver must be signified by the landlord or his authorised agent *in writing*. In *Foott v. Benn* (1), the late L.C.B. Palles is reported to have expressed the view that receipt of rent by a landlord with full knowledge of the breach would still be a waiver of that particular breach.

In 1924 the defendant elected to lose his spirit licence rather than carry on an off-licence trade only. He failed to obtain an off-licence and so committed a breach of his covenant which was a breach for all time. It was not a mere temporary breach that could be remedied at any later time. The licence was irrevocably gone. To consent to such a position the landlord would have to have dispensed with the covenant altogether. The mere waiver of a single isolated breach seems to me to be in quite a different category from the waiver of a breach which wipes the covenant out altogether. The waiver of such a breach as the latter is really a general waiver. This seems to me to be the present case and in my opinion it is covered by the section. The expression of opinion by the Lord Chief Baron has not therefore any application to the present case.

Mr. Murphy relies on *Rex v. Paulson* (2), where there was a provision in the lease that waiver of a breach shall not be operative unless expressed in writing. That case seems to have been decided in special circumstances.

> "The landlord cannot by receiving twelve months rent determine that the lease was a subsisting lease while that rent was accruing and in the middle of that period determine that it no longer subsists."

Section 43 is a statutory provision in aid of the landlord enabling him to receive his rent as it accrues due even while he is awaiting the result of his proceedings for forfeiture. I am of opinion that section 43 governs this case and that there has been no waiver.

The defendant also submits that the notice required by sub-section 1 of section 14 of the Conveyancing Act,

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(1) 18 I.L.T.R. 90.

(2) [1921] 1 A.C. 271.

1881, was defective. The section requires that the notice shall specify the particular breach. The notice in this case specified several breaches, two of which were non-existent or of which no evidence was given at the trial. The breach really relied on was the failure to maintain the licence. The three weeks given by the notice was sufficient time to deal with the questions of repairs and insurance. The other breach, the real crux of the case, was incapable of remedy, but three weeks was sufficient time for the lessee to make offer of compensation. In *Pannell v. City of London Brewery Co.* (1), the question of a notice containing more than one breach was fully considered and I have no hesitation in following the decision in that case. I am, therefore, satisfied that the notice in this case was a good notice within the section.

Merger depends on intention—a question of fact, and the jury have answered this question of fact in favour of the plaintiff. Was there evidence on which they could so find ? I think there was. The plaintiff got the lessor's interest on June 13th, 1918. Eight months later, he assigned the lessee's interest to defendant's predecessor which, in my opinion, following *In re Fletcher, Reading v. Fletcher* (2), was sufficient evidence to justify the jury's finding.

Finally, the defendant says that in view of all the circumstances he is entitled to be relieved from the forfeiture. Sub-section 2 of section 14 of the Conveyancing Act of 1881 says that the Court may grant or refuse relief as the Court, having regard to the proceedings and conduct of the parties under the foregoing provisions of the section and to all the other circumstances, thinks fit. This section travels far beyond the old equitable principles upon which alone prior to the Statute relief was granted. The widest discretion is now given to the Court. The guiding authority in this question of relief seems to me to be the case of *Rose v. Spicer* (3), and the same case in the House of Lords, *Hyman v. Rose* (4). In *Rose v. Spicer*(3)

(1) [1900] 1 Ch. 496.
(2) [1917] 1 Ch. 339.
(3) [1911] 2 K.B. 234.
(4) [1912] A.C. 623.

certain principles are laid down by Cozens-Hardy, M.R., and Fletcher Moulton, L.J., which should guide the Court in the exercise of its discretion. Some of these principles have been pressed upon us on behalf of the plaintiff as reasons for not granting the relief sought. In *Hyman v. Rose* (1), Loreburn, L.C., while recognising the utility of such principles, says, " It ought to be " distinctly understood that there may be cases in " which any or all of them may be disregarded. If it " were otherwise the free discretion given by the " Statute would be fettered by limitations which have " nowhere been enacted." The Court in every case has " a free hand." The " discretion given by the " section is very wide. The Court is to consider all " the circumstances and the conduct of the parties."

Let us see what happened in this case. On the 11th February, 1919, the plaintiff assigned to the defendant's predecessor the residue of a term of 9997 years from the year 1913 in certain premises at 447 Falls Road, Belfast, used as a spirit grocery, and subject to a rent of £35 per annum, for the sum of £400. Plaintiff had at that time acquired the interests of both lessor and lessee in these premises. Plaintiff had now parted with these premises and his only interest in them was to see that his reserved rent was duly paid. His security for this rent was the fabric of the premises plus the licence and goodwill of a spirit grocery. On the 10th April, 1920, the defendant bought the lessee's interest for £1,250. A spirit grocery was a money-making business. Profits were large. The Intoxicating Liquor Act, 1923, of Northern Ireland dealt a fatal blow to spirit groceries. The defendant had now to elect whether he would continue the trade in liquor only as an ordinary " off-licence " or whether he would forfeit the licence and carry on a non-licensed trade. Compensation was offered to those who decided to let the licence go and the defendant received by way of compensation for " loss of profits " the sum of £1,621.

The plaintiff was also entitled to claim compensation for the injury to his reversion by the loss of the licence but failed to do so. The premises are now let as a greengrocery at a rent of £64 and taxes. The defendant was guilty of a breach of his covenant in not maintaining the off-licence on his premises (*Maguire v. Day*) (1). He evidently considered that an ordinary off-licence without the privilege of selling grocery goods on the same premises would not be very profitable for him. There was also the lure of "compensation for loss of profits." His view seems to have been shared by the great majority of the spirit grocers in Belfast. The defendant has broken his covenant to maintain the licence. It is a breach which he cannot remedy. If he is to have relief, it cannot be on terms that he should perform the terms of the covenant in the future. The licence is irrevocably gone. What is the plaintiff's position ? As pointed out already, his only interest in the premises is security for the rent of £35 reserved. His original security was the premises plus the licence and goodwill of a spirit grocery. The jury in this case have awarded him £237 10*s.* 0*d.* damages for breach of the covenant to maintain the licence. The defendant must pay these damages. The plaintiff will then have security for his rent, not the building plus a licence, but the building plus Two hundred and thirty-seven pounds ten shillings the damage which he has suffered by the loss of the licence. A spirit grocery was never a gilt-edged security. According to evidence given on behalf of the plaintiff, the premises are still good security for a rent of Twenty-five pounds. I think the plaintiff is not in any worse position than he was before the breach. In *Hyman v. Rose* (2) Earl Loreburn, L.C., found that the defendant in that case was forbidden to carry on certain trades on the premises concerned, but that there was nothing to prevent any other trade being carried on. In this case the covenant is specific and the defendant is permitted to carry on the licensed trade *only*. The defendant has broken that covenant and the licence is now gone. The defendant cannot now renew the licence, and if the plaintiff were to recover possession of the premises he could not renew the licence. The premises must continue to be non-licensed premises. The plaintiff has been compensated in damages for this breach. I think this is a case inwhich the discretion of the Court ought to be exercised in favour of the defendant and that when he pays the damages assessed for his breach of covenant he ought to be granted relief.

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(1) [1912] A.C. 623.

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(1) [1926] N.I. 80.

(2) [1912] A.C. 623.

Solicitor for the plaintiff: *P. J. Magee.*
Solicitor for the defendant: *George Martin.*

J. McC.

Ch.D.
1931.

Feb. 18, 19,
25 ; Mar. 2.

VISCOUNT MASSEREENE AND ANOTHER v. MURPHY (1).

(1930. No. 123.)

Riparian owners—Obstruction placed by one riparian owner in own half of bed of river—No actual damage to lands on opposite bank—Right of action in respect of such obstruction.

The defendant, who was the owner of premises bounded by a natural river, erected on his own half of the bed and soil of the river, concrete piers and steel stanchions for the purpose of supporting a building. The erection of these piers caused an appreciable quantity of water which formerly flowed over the defendant's half of the bed of the river to be discharged and flow over the plaintiff's half and along the plaintiff's banks on the opposite side but no actual damage was thus occasioned.

Held, that the piers and stanchions constituted an unlawful obstruction and diversion of the waters of the river, and an injunction was accordingly granted compelling the defendant to remove them.

Bickett v. Morris, L.R. 1 H.L., Sc. 47 followed. *Orr Ewing v. Colquhoun,* 2 A.C. 839 and *Kensit v. Great Eastern Railway,* 27 Ch.D. 122 discussed.

ACTION brought by The Right Honourable Algeron, Viscount Massereene and Ferrard and Nathaniel Clarke, owners of lands bounded by the Six Mile Water River at Antrim in the County of Antrim, against Patrick Murphy, the owner of premises known as "The Massereene Arms Hotel" on the opposite bank of the same river.

The defendant had erected, on his own half of the bed and soil of the river, six concrete piers. The outer three of these extended nearly to the middle of the stream which was eighty-seven feet in width. In the piers were embedded steel stanchions for the purpose of supporting a building erected by the defendant over the river.

The plaintiffs sought a declaration that the piers and stanchions so erected were an unlawful obstruction and caused a diversion of the waters flowing in the

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(1) In the Chancery Division before Wilson, J.

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river, and claimed an injunction to compel the defendant to remove them. It was proved that the presence of the piers in the river caused an appreciable quantity of water which formerly flowed over the defendant's half of the bed of the river to be discharged on to and flow over the plaintiff's half of the river but it was not proved to the satisfaction of the Court that any actual damage had yet been caused to the plaintiffs' banks or premises.

Babington, *K.C.* (*Attorney-General*), *Lowry*, *K.C.*, and *Dougherty* for the plaintiffs :

The piers erected by the defendant have caused the water to flow with greater volume and velocity over the plaintiff's half of the river. Any encroachment on the *alveus* of a running stream is actionable without proof that any actual damage has been sustained, unless the defendant can show that there has been no actual damage arising from the obstruction and no possibility of actual damage arising therefrom in the future. *Bickett v. Morris* (1). The defendant having failed to do so in the present case, the plaintiffs are entitled to the relief which they seek.

[They also referred to *Orr Ewing v. Colquhoun* (2), *Kensit v. Great Eastern Railway Company* (3), *Attorney-General v. Earl of Lonsdale* (4), *Crossley & Sons, Limited v. Lightowler* (5), *Attorney-General v. Terry* (6), *Laws v. Turner and Frere* (7), and *Earl of Norbury v. Kitchen* (8)].

Murphy, *K.C.*, *Black*, *K.C.*, and *McSparran* for the defendant :

Bickett v. Morris (1) has been discussed and explained in several subsequent cases and the judgments in these cases shew clearly that it can no longer be regarded as an authority for the proposition that any interference with the bed of a river, although not causing injury, is a ground of action. *Kensit v. Great Eastern Railway Company* (1), *Orr Ewing v. Colquhoun* (2). Again in *Belfast Ropeworks Company, Limited v. Boyd* (3), FitzGibbon, L.J., stated that he could not hold that the mere possibility of injury is sufficient to make an erection *in alveo fluminis* illegal and that he did not think *Bickett v. Morris* (4) was intended so to decide. The plaintiffs have failed to show a reasonable possibility of damage to their banks of the river and this being so, they are not entitled to an injunction.

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(1) L.R. 1 H.L., Sc. 47.
(2) 2 A.C. 839.
(3) 27 Ch.D. 122.
(4) L.R. 7 Eq. 377.
(5) L.R. 3 Eq. 279.
(6) 9 Ch. App. 423.
(7) 8 T.L.R. 584.
(8) 15 L.T. 501.

[They also referred to:—*M'Glone v. Smith* (5), *Ambler v. Mayor of Bradford* (6), *Slack v. Leeds Industrial Co-Operative Society* (7) and *Thompson v. Horner* (8).]

Lowry, K.C. (in reply) referred to *Gerrard v. Crowe* (9).

Cur Adv. Vult.

WILSON, J.

March 2.

WILSON, J.: This action was brought on the 23rd of June, 1930, by the plaintiffs against the defendant for a declaration that certain concrete foundations and pillars erected thereon by the defendant in the defendant's half of the river known as the Six Mile Water are an unlawful obstruction of the waters flowing in the said river whereby the plaintiffs have been and will be injured, and for other relief.

The defendant holds certain premises in the town of Antrim known now as "The Massereene Arms Hotel," which run back to the said river and are bounded on the south by it and are held under a fee farm grant, dated 24th August, 1858, made by Lord Massereene's predecessor in title. The defendant claims to be the owner of one half of the bed and soil of the river opposite these premises under said grant. This claim is either admitted or not contested in this action.

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(1) 27 Ch. D. 122.
(2) 2 A.C. 839.
(3) 21 L.R.I. 560 at p. 580.
(4) L.R. 1 H.L., Sc. 47.
(5) 22 L.R.I. 559.
(6) 87 L.T. 217.
(7) [1924] 2 Ch. 475.
(8) [1927] N.I. 191.
(9) [1921] A.C. 395.

The defendant has, in addition to denials of the doing of the acts, put forward three defences:

(1) That the erections complained of are all in the bed and soil of his half of the river and are not an unlawful encroachment thereon, and that they do not obstruct or divert the accustomed flow of the waters of the river, and that they do not now and will not impede the flow of the waters in the said river, and that the plaintiffs or either of them have not suffered or will not suffer any injury or damage by reason of these erections.

(2) That prior to the erection of any of the piers, the plaintiff Clarke, who was and is agent for the plaintiff Lord Massereene, was aware of the defendant's intention to erect them and that Lord Massereene was also aware of said intention, and that both plaintiffs were fully aware of the nature, extent and progress of the work of erection of these piers and by their statements and conduct during the progress of the work they induced the defendant to believe that no objection would be taken to the said erections by the plaintiffs or either of them, and that the Court ought therefore to hold the plaintiffs estopped from objecting to these erections now.

(3) That the plaintiffs, with the knowledge mentioned in the preceding plea, also knew that the defendant *bona fide* believed that he was legally entitled to erect the said pillars, and that the plaintiffs and each of them, with full knowledge of what was being done and of defendant's belief aforesaid, expressly and/or tacitly acquiesced in the erection of said piers and are not now entitled to any of the relief now claimed by them in this action.

As to the allegations contained in these two last defences, in my judgment there is no foundation in fact for either of them. There is not one tittle of evidence before me that Lord Massereene knew anything about these erections till they were practically completed. The whole of these defences is founded on two conversations defendant had with the plaintiff Clarke, and I find as a fact that Clarke's account of these conversations is the truth, and I do not believe the defendant's account of those conversations. Even if the defendant's account were true and accurate, it would not in my judgment be sufficient to found a defence on the grounds of either permission or acquiescence against either of the plaintiffs. In reality those conversations were in my judgment brought about by the defendant so as to entrap Clarke into something like approval of the work without giving him full or any information of the way it was to be done, *viz.*, by putting piers in the river bed extending forty feet out into the river and nearly to the middle of the stream, and by at first misleading him by wrong information, *viz.*, that the verandah was to be hung from the back wall of defendant's premises like Mr. Hall's verandah next door to defendant's premises but extending out some twelve feet. Hall's verandah came out about six feet. When Mr. Clarke said he was sure Lord Massereene would have no objection to this, the defendant said, " It is out of courtesy to you and Lord Massereene that I asked you as I own half of the river on this side." The defendant's account of this conversation is that he asked Clarke if he would approach Lord Massereene and get him to allow him to put up three uprights in the river to carry the structure and that Clarke said Lord Massereene had nothing to do with it as he—Clarke--owned the other half of the river opposite defendant's premises, and that Clarke said he would have no objection to defendant putting up the three uprights to carry the verandah. This is the conversation which is to prove that both Lord Massereene and Clarke gave permission to put up the three uprights nearest the defendant's premises and three others forty feet further out. On the faith of this the defendant erected a second row of uprights some forty feet out into the river. He then gives evidence of a second conversation with Clarke on 24th April, when the whole six uprights were erected in the river on six concrete beds. The defendant says "Clarke said that I went out too far into the river" and defendant replied, "I had to go out further than I expected in the first instance, but I wasn't aware the river was so wide and when you gave me liberty to put up the three, I thought the three outside would make no difference, and Clarke replied that he would have to write to Lord Massereene's solicitor about it but not to get annoyed as nothing might come of it. Mr. Clarke's account of this conversation is that when he saw the structure put up in skeleton he wrote to Lord Massereene's solicitor and then saw defendant, who said he had to go out further than he intended and that the structure would do no harm to Lord Massereene or me. That the Halls were about to give trouble as they wanted to build up against the defendant's new structure and he (defendant) had left the pillars square for them for he had no objection as the Halls would strengthen his building if they built.

There then remains the question as to whether the defendant, as owner of the bed and soil of the river along his premises on the north side of the river, has a right to erect and keep erected the concrete foundations for these six pillars and then erect six piers round the six steel stanchions, each pier being two feet broad across the stream and five feet long down the stream and some two feet five inches high above the bed of the river; in all, some 145 cubic feet of concrete, and keep it there because it is erected on his own land and has, he alleges, so far done no sensible damage to the plaintiff Clarke's property on the opposite side of the stream or Lord Massereene's property lower down or above the obstruction. Since the erection of these piers no actual damage capable of being measured in money or being noticed by our senses of sight, hearing, smell or touch (if that is the meaning of "sensible") has so far appeared or been established in evidence to my satisfaction, and if the law is that a riparian proprietor on a natural stream can do what he likes in the bed of the river on his own half of the river unless the opposite proprietor or the other riparian proprietors above or below the obstruction can prove actual, as distinguished from nominal, damage, or a reasonable probability of such actual damage, then the defendant would appear to have done no actionable wrong and the action ought to be dismissed.

It would appear from the arguments of Counsel that the law on the subject is in a somewhat obscure state. I think the obscurity will vanish if one applies the maxim *melius est stare decisis quam dicere legem.* The House of Lords seems to have decided in *Bickett v. Morris* (1), argued in May and decided in July, 1866, that any obstruction put in the *alveus* of a natural stream is *prima facie* illegal and ought to be removed though no actual damage is proved to have resulted, unless the person who is guilty of the obstruction can satisfy the Court that there has been no actual damage resulting from the obstruction and also that there is no possibility of any actual damage arising in the future. As far as I know the House of Lords itself has never gone back on that decision. They affirmed (evidently against their preconceived ideas on the subject) the decision of the Scottish Lords of the Session and laid down that the law on this subject was the same in England as in Scotland, and one of them expressly stated that they were laying down this principle for the first time as the law of England. We in Ireland are bound by that decision. The distinguished Law Lords who decided that case never themselves withdrew anything they had said in that case or complained that they had been misreported. One of the noble Lords—Lord Westbury—who seemed to be most reluctant at the beginning of the argument to adopt the conclusion, said : " This is the first decision " establishing the important principle that an encroach- " ment upon the *alveus* of a running stream may be " complained by an adjacent or an *ex adverso* pro- " prietor without the necessity of proving that damage " has been sustained or that it is likely to be sustained " from that cause. I am, however, convinced that the " proposition, as it was laid down in the Court below, " and as it has received your Lordship's sanction in

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(1) L.R. 1 H.L., Sc. 47.

" your judgments, is one that is founded on good sense, " and ought to be established as a matter of law." He further states that such an encroachment ought to be removed. The Scottish Lords of Session were quite clear. Lord Benholme said: " Without the consent " of the proprietor of the other side of the river you " are not to put up your building in the channel of the " river, for that in some degree must affect the natural " flow of the water. What may be the result no " human being with certainty knows but it is my " right to prevent your doing it; and when you do it, " you do me an injury whether I can qualify damages " or not." Lord Neames said: " Neither can any of " the proprietors occupy the *alveus* with solid erections " without the consent of the other because he thereby " affects the course of the whole stream. The idea of " compelling a party to define how it will operate upon " him, or what damage or injury it will produce is out " of the question." Lord Chelmsford said as to these last two quotations: " These views appear to me to be " perfectly sound in principle and to be supported " by authority."

This decision, one would think, was absolutely clear and could only be altered by some Act of Parliament. However, it is said to have been explained or criticised away by interpretations and comments, some in the House of Lords but most of them in Courts of lower authority than the House of Lords. I only take three examples out of many:

(1) In the House of Lords, *Orr Ewing v. Colquhoun* (1), where Lord Blackburn says what he thinks *Bickett v. Morris* (2) decided and sums it all up by saying: " A " proprietor of the *alveus* of the stream up to the " *medium filum aquae* has as incident to his property " the right to insist that the regular flow of the water " should continue on his side as it was wont to flow, " which in ordinary times would be a benefit; and that " nothing should be done to obstruct the regular flow " of the water on the other side of the stream so as to

(1) 2 A.C. 839 at pp. 858—860.
(2) L.R. 1 H.L. Sc. 47.

"cast more water on his side than had been wont to "flow, which at least in times of flood would be a "burden. The defendant had, without any right, "built an encroachment on his side of the river which "*necessarily* caused more water to flow on the pur-"suer's side, and though that encroachment was small, "it was such as in a small stream to make a sensible "alteration in the flow. That was an injury to the "proprietary right of the pursuer but he was not able "to qualify present damage." He then goes on to show that in some rivers, like the Amazon, there might be an obstruction of one or two feet on one side and the opposite riparian proprietor would not be in a position to require the opposite proprietor to remove it for it would do him no sensible injury, though in the narrow Kilmarnock Water such an encroachment did do the opposite proprietor sensible injury which, especially seeing it was in a town and was or might be building land, was very likely to produce substantial damage though he might not as yet be able to shew present damage, and he winds up by saying : " I think it is clear law in England that, except at the instance "of a person whose property is injured, or of the Crown "in respect of an injury to a public right, there is no "power to prevent a man making an erection on his "own land, though covered with water, merely on a "speculation that some change might occur that would "render that piece of land, though not now part of the "waterway, at some future period available as part "of it. I think that the land being covered by water "is in such a case a mere accident, and that the de-"fenders are as much at liberty to build on the bed "of the river (*if thereby they occasion no obstruction*) as "they would be to build on an island which might at "some future time be swept away." One must remember that Lord Blackburn was dealing with an alleged obstruction to navigation in this case and not with a case where a riparian proprietor was complaining of injury to his property and an encroachment which interfered with his right to the natural flow of the stream to and past his lands. But even so, he seems to have thought that *Bickett v. Morris* (1) required a lot of explaining and that sensible injury, likely to produce substantial damage possibly to probable building land, must be proved by a riparian proprietor before such an injunction as was granted in *Bickett v. Morris* (1) could be obtained.

(2) In *Kensit v. Great Eastern Railway Co.* (2), Cotton, L.J., says what was decided in *Bickett v. Morris* (1) was that "what interferes with the channel of the "river was a matter which would be actionable unless "the Court were satisfied that there would not be any "injury from it either then or at any future time ; and "in such a case as the flow of water, which is so "difficult to deal with, it would be a difficult case to "determine whether what had been done would or "would not produce any injury. If there was a "reasonable prospect that it would produce any "damage to the opposite or lower riparian proprietor, "then that would give a right of action, although no "actual injury was shewn to have resulted from it." From this it would follow that a riparian proprietor who complains of an obstruction in the *alveus* of a river, which alters the prior ordinary and natural flow of the river to and past his lands, must show that there was a reasonable prospect that the obstruction would produce some damage to him or the lower riparian proprietors before he could maintain his action where, up to the issue of the writ, he could show no actual damage to have resulted from it. This seems very different from what the noble Lords said in *Bickett v. Morris* (1), *viz.*, that the obstruction was *prima facie* illegal and must be removed by the Court unless the person who put it there could show that it had not and could not at any future time produce any damage to the riparian proprietor who complained of it. It also makes the Court of first instance ascertain not simply if any reasonable damage has been done but the much more difficult task of ascertaining, without anything to

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(1) L.R. 1 H.L., Sc. 47.

(2) 27 Ch.D. 123 at p. 131.

guide one but guesswork, whether there is any reasonable prospect of future damage, which Lord Benholme had said "no human being with certainty knows." Above all, it brings in the reasonable man and lets him loose on the future.

(3) The third illustration, *viz.*, the case of *Thomson v. Horner* (1), which was heard on an appeal from the Recorder of Londonderry, where a riparian proprietor took three feet off the bed of a fourteen feet wide river and annexed it to his own land for a considerable distance along the length of the river, and thereby necessarily made the waters of the river flow in an eleven foot wide channel which formerly and naturally flowed in a fourteen foot wide channel The proprietor at the other side of the river and opposite the new embankment brought an action complaining: (*a*) that that was a wrongful encroachment on the bed of the river; (*b*) that it diverted the river from its ordinary and natural flow and that it impeded the river so as to render the plaintiff's land subject to flooding. The Judge who heard the case stated a case for the Court of Appeal for Northern Ireland and said that no evidence of any actual damage by reason of the change had been given and he would hold that there was no diversion of the river if he was entitled to do so according to law, and the Court of Appeal held that diversion was a question of fact and as the Judge who stated the case had found there was no diversion and no actual damage, they must affirm his decision, and the plaintiff's action was dismissed with costs. I was pressed to follow this decision, which showed that where no actual damage was proved, one riparian proprietor was entitled to take more than one-fifth of the entire bed of the river and annex it to his own land and the opposite riparian proprietor had no cause of action against him, whereas in the present case where the river is said to be eighty-seven feet wide they had only put down six piers in the bed of the river, occupying only some sixty square feet of it, when they could have built a solid building along the defendant's whole

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(1) [1927] N.I. 191.

frontage occupying 18 by 30, that is 540 square feet of the bed of the river, provided they did not build more than eighteen feet out into the bed of the river, and provided also that the opposite or other riparian proprietor could not prove any actual sensible damage to his property.

When dealing with the pollution of rivers during last century in industrial England and the "*de minimis non curat lex*" decisions of our Courts (which allowed the gradual pollution of rivers to go on till the rivers became little better than open sewers and only woke up (as in the *St. Helen's Smelting Co. v. Tipping* (1)) too late and decided that the fact that a river was already polluted did not justify further pollution of that river) a learned French critic of our British jurisprudence said that the Scottish lawyers and judges, educated and trained on Roman and Civil law, with a great grasp of principle and with very logical minds, might have made a science of it ; but they were met by the great lawyers and judges in England, who thought that a reasonable and big view should be taken of everything, including principles, and always introduced "the reasonable man," who, in ultimate analysis, turned out to be what each judge, at his very best, thought was right and just in the particular case, and also had to contend formerly with the Irish judges, who always founded their judgments on the highest possible principles carried along by a flood of emotion which often submerged the principle. He therefore found it hard to discover what the real law applicable to any British or Irish case was until it was decided by the ultimate tribunal.

As for me, all I as a judge of first instance can do is to follow all these decisions if they agree with *Bickett v. Morris* (2) and to disregard them if they do not agree or even if they improve *Bickett v. Morris* (2).

Mr. Barnhill, who was the engineer in the case of *Thomson v. Horner* (3) and proved there that no

(1) 11 H.L. Cas. 642.
(2) L.R. 1 H.L. Sc. 47.
(3) [1927] N.I. 191.

sensible damage was done to the plaintiff's lands by what was done by the defendant in that case, gave similar evidence in this case. However, he admitted that the piers in this case theoretically altered the natural flow of the river and raised the height of the water in the river all across the river by a fraction of an inch. That that fraction of an inch varied with the quantity of water in the stream. If the water in the river were up to the point C. on his cross-section, an extra amount of water weighing over one ton would go down the river over the thirty foot breadth of Mr. Murphy's premises and more than half of this, or more than half a ton of water, would go down over Mr. Clarke's half of the river which did not formerly go there and would necessarily raise the water on Mr. Clarke's bank opposite the upper row of piers .382 of an inch, which would gradually get lower till it came back to the original level of the water thirty feet down the river, but he said this did no appreciable damage to Mr. Clarke's banks or the bed and soil on his half of the river. Mr. Macassey, an equally eminent engineer called as a witness for the plaintiffs, proved that the deepest part of the river before these piers were erected was at the cross section No. 61 on his map and that was formerly where the swiftest current in the river then flowed. Since the piers have been put up the swiftest portion of the river has been changed to some distance nearer Mr. Clarke's bank than formerly, and that this will eventually become the deepest part of the river as it passes along Mr. Clarke's premises and that the flow of the river below the uppermost pier has been thrown more towards Mr. Clarke's side of the river than formerly, and this has an effect all down the course of the river. Looking at the river, it has a bend to the south at or above Masserene Bridge, and below the Bridge the water tends to flow off the north bank towards Mr. Clarke's side of the river, and the water at Mr. Clarke's side is deeper a good deal than on the defendant's side of the river.

I find as a fact from the evidence that the piers have altered the natural flow of the river to, along and past both the plaintiffs' lands and have caused the river to flow with greater volume and velocity and erosive power over Mr. Clarke's half of the river and along past Lord Massereene's property immediately below Mr. Clarke's premises than it hitherto flowed, and the tendency is to make the river shallower along the defendant's side of the river and deeper along the south side of the river. It has also been proved that just below Mr. Clarke's premises a wall was at some time built along Lord Massereene's bank to prevent the river eating into that bank. That old wall has been there a very long time and must have been built for the protection of that bank from the river as it does not rise higher than the adjoining lands. I have therefore come to the conclusion that the piers complained of have :—

(*a*) interfered with the plaintiffs' rights as riparian proprietors to have the flow of the river in its natural course come to, along and past their lands as formerly ;

(*b*) that these piers have caused an appreciable quantity of the water of this river, which formerly flowed down over defendant's half of the river, to be discharged on to and flow down over the plaintiffs' half of the river and along the plaintiffs' banks on the south side of the river.

This, in my judgment, is a continuing trespass on the lands of both plaintiffs, to wit, pouring water on to their lands against their will and without their consent and this is caused by these piers erected by the defendant on his own half of the bed of this river. No actual damage has yet been caused by this, but I am not in a position to say that it has not caused some of the bed and soil and of the bank of the river on the south side to be worn away and carried down stream, nor am I able to say that it will not do so in the future. There has been no great flood in the river seen by any of the expert witnesses, and I do not know whether the above is what Lord Blackburn calls "sensible injury" or not, or if it amounts to a "reasonable prospect of future damage" as mentioned by Lord Justice Cotton, but it is a definite infringement of plaintiffs' rights to the flow of this river in its ordinary and natural course, and also a distinct trespass on the property of both plaintiffs for which in my judgment defendant has neither justification or excuse. I must therefore give the plaintiffs a declaration that the concrete pillars and steel stanchions erected in the bed and soil of the river are an unlawful obstruction and diversion of the waters flowing in said river, and an injunction to compel the defendant forthwith to remove the said concrete pillars and steel stanchions, and to restore the bed and soil of the river to its former condition, and I order the defendant to pay the taxed costs of the plaintiffs in this action.

Solicitors for the plaintiffs : *Darley, Orpen & Synott.*
Solicitor for the defendant : *John K. Currie.*

J. D. C.

GALLAGHER v. KENNEDY (1).

K.B.D.
(Probate)
1931.

March, 13.

(1931. No. 2.),

Probate—Practice—Particulars—Name of witness—Disclosure of.

The defendant, in a probate action pleaded that the will which the plaintiff sought to establish was not signed by the testatrix or by any other person in her presence and by her direction.

Held, that, as this amounted to a plea of forgery, the defendant must disclose the name of the person by whom, and the time when it was alleged that the document was signed.

Motion for further and better particulars.

In an action brought to establish the will of one, Mary McGarry, deceased, the defendant, in addition to the four statutory pleas, pleaded that:—

"The paper writing bearing date the 16th day of "November, 1929, and alleged by the plaintiff to "be the last will and testament of the said Mary "McGarry was not signed by the said Mary McGarry "or by any other person in her presence and by her "direction."

The plaintiff moved for an order that the defendant should, within four days, deliver to the plaintiff particulars of the person by whom, the place where and the time when it was alleged that the will of Mary McGarry, dated the 16th day of November, 1929, was signed.

Murphy, *K.C.*, *Lowry*, *K.C.*, and *Chambers* for the plaintiff.

The plea that the will, which it is sought to establish, was not signed by the testatrix is a plea of forgery. The plaintiff is accordingly entitled to know the name of the person who is alleged to have forged the document.

[They referred to *Kingston v. Corker* (2).]

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(1) In the King's Bench Division (Probate) before Moore, L.C.J.

(2) 29 L.R. I. 364.

McGonigal, K.C., and *Nicholson* for the defendant :—

The defendant objects to give the particulars sought, on the ground that by doing so he would be disclosing the name of one of his witnesses.

No litigant is obliged to disclose the name of any of his witnesses unless the name of the witness is a material matter in the case. *Bishop v. Bishop* (1).

[They also referred to *Hooton v. Dalby* (2), *Nash v. Layton* (3), and *Eade v. Jacobs* (4).]

MOORE, L.C.J.

MOORE, L.C.J. : [His Lordship, having stated the circumstances in which the application for further and better particulars was made, continued] :—

The first paragraph in the defence alleges that the will in dispute was not executed according to the provisions of the Statute. The second paragraph alleges that the deceased was not of sound mind, memory and understanding at the time of the execution of the will. The third paragraph contains an allegation of undue influence on the part of the plaintiff, while it is alleged in paragraph four that the deceased did not know and approve of the contents of the will. The substance of these four pleas is that the alleged will may be a good will, but liable to be vitiated.

It is alleged in paragraph five, however, that the document is false and not a will at all. This plea is very different from the four preceding ones. It is really a defence by way of attack and in my opinion the plaintiff is entitled to know, from the attacking party, the name of the person who is alleged to have committed the forgery.

I accordingly order the plaintiff to furnish the particulars sought.

Solicitor for the plaintiff : *T. Erskine Alexander.*
Solicitor for the defendant : *James Thompson.*

J.D.C.

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(1) [1901] P. 325.
(2) [1907] 2 K.B. 18.
(3) [1911] 2 Ch. 71.
(4) 3 Ex.D. 335.

THE KING (URBAN DISTRICT COUNCIL OF PORTADOWN) v. CHAIRMAN AND JUSTICES OF THE PEACE FOR THE COUNTY OF ARMAGH (1).

K.B.D.
1931.

April 20, 23.

Meaning of words—" article or thing "—Whether live pig is within such description—Street Trading (Regulation) Act (Northern Ireland), 1929 (20 *Geo.* 5, *c.* 9) *s.* 1.

Under section 1, sub-s. 1, of the Street Trading (Regulation) Act (Northern Ireland), 1929, any person who sells or exposes or offers for sale, any article or thing at a place in the carriage-way or footway of any street, without having first obtained a licence, as therein provided, is guilty of an offence.

Held, that a live pig was an " article or thing " within the meaning of this section.

MOTION to make absolute a conditional order of certiorari, dated the 13th day of February, 1931, removing into the King's Bench Division for the purpose of being quashed, the orders and adjudications of the Chairman and Justices of the County of Armagh, on the hearing of an appeal by one, John Black, from an order of the Justices sitting at Portadown, on 12th May, 1930.

The following is the portion of the case stated by the Chairman of the Quarter Sessions (2), material to this report :—

1. The matter of this case stated came before me at the Lurgan Quarter Sessions on the 2nd day of June, 1930, by way of appeal from an Order of the Justices sitting at Petty Sessions at Portadown, in the Division of Lurgan.

2. The following facts were proved or admitted before me :—

(*a*) The appellant, John Black, carries on the business of a pig dealer, in the course of which he utilizes a cart laden with crates in which are placed young live pigs for sale. While business is being carried on the said cart is stationary, no horse is attached to the said cart, the shafts of which rest on the ground. On occasions the crates with the contents are placed on the street.

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(1) In the Divisional Court before Moore, L.C.J., and Brown, J.

(2) His Honour Judge Green, K.C.

(*b*) The appellant has carried on this business for many years, and in the town of Portadown has always carried on this business on Saturdays, in Woodhouse Street, the wholesale market under the bye-laws, and other persons are likewise engaged in the same business or trade.

(*c*) The said John Black is not, nor was he at any material time, a farmer selling his own farm produce when engaged in such business.

(*d*) On Saturday, the 15th day of March, 1930, the said John Black was so engaged at Woodhouse Street, Portadown, and in respect of that day he was subsequently prosecuted at the Petty Sessions at Portadown, on the 14th day of April, 1930, by the respondents, who are the local authority, for exposing pigs for sale without a licence from the respondents, authorizing him so to do, contrary to the provisions of the Street Trading (Regulations) Act (Northern Ireland), 1929, and fined one shilling and costs. From this order the defendant, John Black, appealed such appeal being a test case.

(*e*) The appellant was aware of the fact that he was required to obtain a licence under the Street Trading (Regulation) Act (Northern Ireland), 1929, and a poster drawing attention to the Act was published in November, 1929.

(*f*) The bye-laws of the Council with respect to markets were put in evidence and are to be incorporated in this case.

(*g*) The ordinary market tolls were, on the 15th day of March, 1930, collected from the said John Black in respect of the number of animals he had for sale.

(*h*) It was contended on behalf of the appellant that the Street Trading (Regulation) Act (Northern Ireland), 1929, did not apply to the case of the

K.B.D.
1931.

THE KING (U.D.C. OF PORTADOWN) v. CHAIRMAN AND JUSTICES OF ARMAGH.

appellant, that a pig as sold by the appellant was not an "article" or "thing" within the meaning of the Act.

(2) On behalf of the respondent it was contended that a pig as sold by the appellant was an "article" or "thing" within the meaning of the Act, and that on the facts and in the circumstances of the case presented I was not satisfied that a pig as sold by the appellant was an "article" or "thing" within the meaning of section 1.

I accordingly reversed the decision of the Justices at Petty Sessions and dismissed the said complaint, but at the request of the respondents, I agreed to state this case.

The question for the Court is :—

Is a live pig as sold, or for sale, in the market by the appellant, an "article" or "thing," within the meaning of section 1 of the Street Trading (Regulation) Act (Northern Ireland), 1929.

Davison, K.C., and *Sheil* for the Urban District Council.

No wider terms than "article" or "thing" could be used; these words must include pigs. The Street Trading (Regulation) Act (Northern Ireland), 1929, does not contain any provision which limits its scope to inanimate objects.

In *Llandaff and Canton District Markets Company v. Lyndon* (1), it was held that a horse was an "article" within the meaning of the Landaff and Canton District Markets Act, 1858 (21 & 22 Vict. c. 105), section 25.

Murphy, K.C., and *Chambers* for the defendant :—

"Article" in section 1 obviously means any wholly inanimate chattel. "Thing" should be construed *ejusdem generis* with "article" and accordingly cannot extend its meaning to animate objects.

The *Llandaff Market Company's Case* (1) was a decision on the meaning of the expression "any article

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(1) 8 C.B. (N.S.) 515.

MOORE, L.C.J.

April 23.

subject to tolls" and as these were subsequently defined in the Act which was there under consideration, it cannot govern the present case.

Cur. adv. vult.

MOORE, L.C.J.: Mr. Justice Brown and I have agreed in our conclusions on the questions raised in this case and at his request I now deliver the judgment of the Court.

The proceedings before us are really in the nature of a case stated, but the form is an application for a writ of certiorari to bring up and quash an order made by the County Court Judge of Armagh, dated 6th day of October, 1930, sitting as a Justice at Lurgan Quarter Sessions, which reversed an order made at Petty Sessions dated 12th day of May, 1930, fining one John Black in one shilling and costs.

John Black, a dealer, was prosecuted at the instance of the Portadown Urban Council for selling within their area young pigs from a crate resting on a stationary cart. The Justices convicted John Black.

The Statute under which John Black was so convicted is The Street Trading (Regulation) Act (Northern Ireland), 1929.

Under section 1 (sub-s. 1) of that Act any person selling any "article" or "thing" as Black sold his pigs, without having obtained a licence as therein provided, is committing an offence.

Black was, accordingly, rightly convicted by the Justices, if young pigs alive are either "articles" or "things" within the meaning of the section.

The learned County Court Judge held that they were not; hence the present application to this Court.

I am disposed to consider that "article" is appropriate to inanimate chattels; "things" both to animate and inanimate.

Mr. Davison referred us to a case of *Llandaff and Canton District Market Company v. Lyndon* (1). We do not think, however, that this case is really of much assistance. The offence there charged was selling outside certain limits "articles" on which a toll was imposed in a schedule to the Act creating the offence. The toll was in respect of the markets. The traverser sold a horse, and the horse was in the tollable list upon the schedule. Held that horse "was included under 'article'" by virtue of the schedule.

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(1) 8 C.B. (N.S.) 515.

We think we must construe the Street Trading (Regulation) Act (Northern Ireland), 1929, as standing by itself, to find out what the Legislature really intended; the same words used in different codes may very possibly have different meanings in each code according to the various intentions of the Acts, having regard to the various mischiefs they are to prevent.

Perhaps it may seem hard, as Mr. Murphy has pressed upon us, that rights exercised for many years as Black has exercised his in the present case, should be altered or diminished, but if the Legislature chose to do so by the Statute under consideration, that is for them and not for this Court.

We also consider that we cannot and should not construe the Statute by reference to the bye-laws now in force. Such bye-laws merely represent the view taken of the Statute by their draughtsman, and it is our views and not his which must determine the matter.

Mr. Murphy's argument was that while "article" meant wholly inanimate chattels, "thing" was meant to be *ejusdem generis* to "article" and could not extend the meaning of "article."

As I have already said I think that "article" is applicable to inanimate, but "thing" to both live and dead matter; it is an alternative to "article" and not limited by it, and may even extend it.

But we find nothing in the Statute making any distinction between "things" living or dead. We further think the answer to any such construction, as Mr. Murphy has urged upon us, can be found in the Statute itself.

This governing prohibition in the Act which makes sales without a licence an offence, extends plainly to all produce raised by a farmer on his farm, for otherwise this would not have required to be specially exempted under section 14.

Mr. Murphy relied on the marginal note to this section —" saving for sale of farm produce." We do not allow the use of marginal notes in Northern Ireland for purpose of interpretation. (See judgment of Andrews, L.J., in *Bruce v. Jackson* (1).)

I think this present instance shows how right the Courts were. The marginal note is wrong in suggesting that all farm produce is " saved." The section does not save it as such, but only that particular " thing " produced on the particular farm of each vendor.

In conclusion, we have no doubt that " things " include pigs live or dead ; that " things " certainly include farm produce other than that produced by the vendor ; that " pigs " are also products of a farm, being produced there, and that Black, not being a farmer selling his own produce, was rightly convicted of an offence in selling without a licence " things " within the meaning of the Statute.

[His Lordship then proceeded to deal with another aspect of the case, not material to this report.]

We are of opinion that the writ should go ; that the conditional order be made absolute ; that the order of the County Court Judge at Lurgan Quarter Sessions, dated 6th October, 1930, should be discharged, thereby restoring the Petty Sessions order, and that the costs of the present proceedings should be borne by John Black.

Solicitor for the Portadown Urban District Council : *G. P. Girling.*

Solicitor for the defendant : *R. M. Cullen.*

J. D. C.

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defendant company's debenture for £300, which should have been registered within 21 days, viz., on or before 13th March, 1930. As S. J. McC. was endeavouring to effect a flotation of his company as a public company, he requested the plaintiffs not to register the debenture until the last moment, which they agreed to do. On 13th March, S. J. McC. asked for further time, and it was ultimately agreed that in lieu of such registration plaintiffs should advance S. J. McC. £400 on the security of a new promissory note and a debenture for that amount out of which sum he should forthwith repay the £300 previously borrowed with interest thereon. This was intended to give S. J. McC. the additional time he required without prejudicing the plaintiff's security. In pursuance of this arrangement the plaintiffs gave S. J. McC. their own cheque for £400. W., who acted as solicitor to both parties, attended with S. J. McC. at the Bank on 15th March when the cheque was presented for payment, and when the latter received the £400 he immediately in pursuance of the agreement handed to W. the sum of £310 in payment of principal and interest on foot of the first loan which sum the latter immediately lodged to the credit of the plaintiff company. The debenture for £400 was duly registered. The contemplated flotation did not materialise and the defendant company went into voluntary liquidation. *Held*, by the Court of Appeal (Andrews and Best, L.JJ.) that under section 212 of the Companies (Consolidation) Act, 1908, the mortgage debenture for £400 was invalid except to the extent of £90, the net amount received by the defendant company on foot of the promissory note and debenture for £400, with interest thereon at five per cent. *Revere Trust, Ltd. v. Wellington Handkerchief Works, Ltd.*
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EMPLOYER AND WORKMAN—Compensation—Principal and Contractor—*Power of applicant to elect which to make liable for compensation—Accident arising out of and in the course of employment by a contractor in the execution of work undertaken by the principal—Workmen's Compensation Act (Northern Ireland)*, 1927, *s.* 6. The appellant, W.C., carried on business as a coal merchant and importer of coal. In the transference of a cargo from a ship to the sheds, he employed H., a cartage contractor, to send two horses and two carts at the rate of 12s. 6d. per day for the hire of each horse and cart and man in charge. H.C., the applicant, who was in charge of one horse and cart, was hired by H. for 15s. per week and food, and while engaged in "canting" the tub conveying the coal from the hold of the vessel to the cart, was injured. The County Court Judge being of opinion that the applicant was at the time of the accident in the employment of the appellant, and that the accident arose out of and in the course of his employment, awarded him compensation and refused the application of the appellant for indemnity against the contractor, H. *Held*, by the Court of Appeal (Moore, L.C.J., and Best, L.J.), that (a) there was evidence to support a finding by the County Court Judge that the accident arose out of the applicant's employment; (b) that the work on which the applicant was engaged at the moment of the accident was work in the course of the appellant's ordinary trade or business; (c) that the work of "canting" coal was part of the work undertaken by the appellant and he was liable to compensate the applicant. *Hockley v. West London Timber and Joinery Company* [1914] 3 K.B. 1013, discussed. *Held* also, that as the contractor H. would have been liable to pay compensation to the applicant, he must, under sub-section (2) of section 6 of the Workmen's Compensation Act (Northern Ireland), 1927, indemnify the appellant. *Cole v. Calvert and Harpur.* [C.A. 38.

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[C.A. 141

LANDLORD AND TENANT—LEASE—FORFEITURE FOR BREACH OF COVENANT—WAIVER *of Forfeiture by acceptance of rent—Continuing Breach—Validity of Notice—Sufficiency of* *period allowed to have breach remedied—Merger—Intention—Relief against Forfeiture—Conveyancing Act*, 1881 (44 & 45 *Vic.*, *c.* 41), *s.* 14—*Landlord and Tenant Act* (*Ireland*), 1860 (23 & 24 *Vic.*, *c.* 154), *s.* 43. By lease of 8th October, 1913, certain premises in B. were demised as a spirit grocery with goodwill, fixtures, and licences, for the term of 9997 years, at the yearly rent of £35. The lease contained covenants on the part of the lessee and his assigns *inter alia* to use the premises as a spirit grocery and beer retailer's establishment only, and at all times during the term to apply for and endeavour to procure a renewal of the necessary licences, and it also contained a clause of re-entry on breach of covenant. The lessee's interest in the lease was assigned to the plaintiff on 2nd November, 1915, and on 13th June, 1918, the lessor's interest also became vested in him. The defendant became possessed of the lessee's interest on 10th April, 1920. In January, 1924, the defendant was refused a renewal of the licence in connection with the premises under the provisions of the Northern Ireland Intoxicating Liquor Act, 1923, as he was carrying on another trade, grocery, in addition to his liquor trade on the premises. The liquor licence for the premises then lapsed, and owing to the provisions of the Intoxicating Liquor Act (Northern Ireland), 1923, it could not be renewed. On 3rd April, 1930, the plaintiff served a notice in writing on the defendant under section 14 of the Conveyancing Act, 1881, complaining of breaches of the covenants contained in the lease, to keep the premises in good repair, to keep them insured in accordance with the covenant, to maintain them as a spirit grocer's and beer retailer's establishment, and to do the acts necessary to renew the spirit grocer's and beer retailer's licences. It was alleged in the notice that the licences had been allowed to lapse by the default and neglect of the defendant, to the great damage of the reversion expectant upon the lease. The notice required that within three weeks of its service, the breaches complained of should be remedied, and that reasonable compensation should be made to the plaintiff. On the 1st May, 1st August and 1st November following the service of the notice rent was paid to, and accepted by, the plaintiff. On 6th May, 1930, the plaintiff issued a writ claiming possession of the premises, and damages for the breaches of covenant. The action was tried before Moore, L.C.J., and a special jury and resulted in judgment for the plaintiff for possession of the premises, and £237 10s. 0d. damages for the breaches of covenant. The defendant appealed to the Court of Appeal. *Held*, by the Court of Appeal (Andrews and Best, L.JJ., and Brown, J.) (*a*) that the plaintiff having definitely exercised his option of relying upon the forfeiture, and having shown a final and unequivocal determination to take advantage of it by instituting proceedings in ejectment, the subsequent acceptance of rent by him could not operate as a waiver of the forfeiture, and that the breach being of a continuing character, waiver of the forfeiture up to a particular day could not be relied on as a defence to an action for ejectment in respect of a subsequent breach ; (*b*) that the notice served under section 14 of the Conveyancing and Law of Property Act, 1881, sufficiently specified the particular breaches complained of, and that it was not invalidated because it specified breaches of covenant which were not made the subject of complaint in the action, nor because particulars of all the breaches were not specified ; *Pannell v. City of London Brewery Co.* [1900] 1 *Ch.* 496, *and Fox v. Jolly* [1916] 1 *A. C.* 1, *followed ;* (*c*) that in the circumstances three weeks was a sufficient time to specify in the notice ; (*d*) that having regard to all the circumstances, and especially to the actions of the plaintiff in his dealings with the lease of 8th October, 1913, it could not have been his intention that merger should take place, and that the jury were fully justified in their finding that it was not intended that the two estates should be merged ; (*e*) that the Court should exercise its discretion in favour of the defendant and grant him relief from the forfeiture (Andrews, L.J., doubting but not dissenting). *McIlvenny v. McKeever.*

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LANDLORD AND TENANT—RECOVERY OF POSSESSION—DWELLING-HOUSE *required by landlord for himself, being a person engaged on work necessary for proper working of an agricultural holding—Engaged—Meaning of—Rent and Mortgage Interest Restrictions Act* (*Northern Ireland*), 1925 (15 & 16

Geo. 5, *c.* 12). The plaintiff's father purchased a farm for the plaintiff who was registered as owner of the farm. The only dwelling-house and buildings on the farm were occupied by the defendant as a monthly tenant under the usual cottier tenancy agreement, and this tenancy was duly determined by notice to quit. The plaintiff, who was a person engaged on work necessary for the proper working of an agricultural holding, required the dwelling-house on the farm for his own occupation. *Held*, by the Court of Appeal (Best, L.J., and Brown, J.), that clause (ii) of sub-section 1 of section 4 of the Rent and Mortgage Interest Restrictions Act (Northern Ireland), 1925, applied to the plaintiff as being a person engaged on work necessary for the proper working of an agricultural holding, that the plaintiff was entitled to succeed as coming within the provisions of this clause, and that it was not necessary to offer evidence of alternative accommodation. *Sands v. Gardiner.*
[C.A. 1

LAND PURCHASE—Sporting *rights not in possession or enjoyment of vendor on appointed day—Vesting of such rights —Irish Land Act,* 1903 (3 *Ed.* 7, *c* 37), *ss.* 13 *&* 99—*Northern Ireland Land Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 34), *ss.* 8 *&* 15. The estates of M. were estates to which the Northern Ireland Land Act, 1925, applied. The sporting rights on several townlands forming part of the estates had been let by the owner, and these lettings were in existence on the appointed day. Agreements were entered into between the owner and some of the purchasing tenants, purporting to be pursuant to section 13 of the Irish Land Act, 1903, whereby the tenants, consented to the sporting rights on their respective holdings being reserved to the owner. The owner served notices pursuant to section 15 of the Northern Ireland Land Act, 1925, requesting that the rights of fishing and taking fish on the holdings in question should be reserved to him. It was claimed on his behalf that the sporting rights, being let, were not in the possession or enjoyment of the owner on the appointed day and accordingly vested in him, and not in the Land Purchase Commission, on the expiration of the leases. *Held*, that the notices relating to fishing rights served by the owner operated to reserve such rights to him. And *Held*, that the agreements entered into with the tenants did not operate to reserve all sporting rights to the owner without the assent of the Land Purchase Commission. And *Held*, that the sporting rights which were let at the appointed day were not in the possession or enjoyment of the owner and that by virtue of the provisions of section 99 of the Irish Land Act, 1903, such sporting rights did not vest in the Land Purchase Commission. *Montgomery's Estates.*
[Jud. Commr. 14

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LICENSING LAW—Permitting consumption *of intoxicating liquor on premises licensed only for sale of intoxicating liquor for consumption off the premises—Defendant not personally aware of, or personally concerned in the commission of the offence—Whether extenuating circumstance "in connection with the offence"—Intoxicating Liquor Act (Northern Ireland),* 1923 (13 *&* 14 *Geo.* 5, *c.* 12) *s.* 8 (1). At a Court of Petty Sessions held at Belfast the respondent was convicted of the offence of permitting consumption of intoxicating liquor on her licensed premises, such premises being licensed only for the sale of intoxicating liquor for consumption off the premises. The in-

cident complained of took place during the defendant's absence and while her son was in charge of the business. The Magistrates imposed a fine of forty shillings, but on the ground that there were extenuating circumstances connected with the offence, they did not record the conviction on the defendant's licence. The extenuating circumstances as set out by the Magistrates in the Case Stated were as follows :—" That the defendant, during her temporary absence from Belfast, owing to ill-health, entrusted the carrying on of her licensed business to her son, and that she was not personally aware of or personally concerned in the commission of the offence and as she bears an unexceptional character, we inferred and believed that she would not have committed the offence herself, had she been present, nor have allowed anyone else to commit it." *Held*, that these matters were not extenuating circumstances in connection with the offence, within the meaning of section 8, sub-sec. 2 of the Intoxicating Liquor Act (Northern Ireland), 1928, and accordingly that the conviction must be recorded on the defendant's licence. *Hetherington v. Halfpenny.*
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MOTION FOR JUDGMENT—*Whether included under " appeals "—Appeal to Court of Appeal or to Divisional Court—Government of Ireland Act*, 1920 (10 *&* 11 *Geo.* 5, *c.* 67), *section* 41 (1)—*Effect of—Judicature Act* (*Ireland*), 1877, *section* 51—*Costs of argument before full Court, appeal having come before two members of the Court—Interpretation of Statute.* During the argument in a motion for judgment before the Court of Appeal it was contended on behalf of the defendant (*a*) that such a motion is not of itself an " appeal " ; (*b*) that a motion for judgment should be made to the Divisional Court and not to the Court of Appeal, as it has not been affected by the Government of Ireland Act, 1920, section 41 (1). The Court decided that as the question was of considerable importance it should be argued before a full Court. *Held*, by the Court of Appeal (Moore, L.C.J., Best, L.J., Wilson, J., and Brown, J.), that the effect of the passing of the Government of Ireland Act, 1920, was to abolish " appeals," whether so called or not (including motions for judgment), to the Divisional Court, and to substitute for them appeals to the Court of Appeal. *Pollock v. Livingstone.*
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[C.A. 31

PRACTICE—Costs—*Setting off costs in separate actions—Equitable practice of Court.* O. had obtained interlocutory judgment against M. in an action for negligence in default of defence, and M. had obtained final judgment against O. on foot of a specially indorsed writ in an action on a money count. M. moved for, and obtained an order setting aside the interlocutory judgment and giving him leave to defend the action upon terms that he should pay O.'s costs incurred in entering and vacating the judgment and of the motion. M. then applied for an order that the costs payable by him to O. under the order setting aside the interlocutory judgment, should be set off against a corresponding amount of the debt and costs due to him (M.) by O. under the final judgment which it was considered impossible to realize. *Held*, that the liability for the costs of setting aside the interlocutory judgment, having been incurred by virtue of a special bargain with the Court in return for a special privilege, were distinguishable from the ordinary liability for costs under the final judgment and should not therefore be allowed to be set off against this worthless debt. *Ogle v. Mills.* [K.B.D. 26

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PRACTICE — Particulars — *Action for personal injuries—Further and better particulars for special damage.* In an action for personal injuries the plaintiff alleged that the accident was caused by negligent driving on the part of the defendants' servants. The solicitor for the defendants served a notice on the solicitors for the plaintiff to supply him with further and better particulars of the items of special damage set forth in the statement of claim relating to (1) medical, surgical and nursing expenses, and (2) to the loss of profits, with all necessary details, dates, and items covering such period of time and all previous periods of time necessary to be examined for the purpose of comparison. The plaintiff's solicitors refused to supply these particulars, on the ground that it would be prejudicial to the interests of plaintiff's case to give them. The defendants then applied to the Lord Chief Justice by motion for an order that the plaintiff should deliver the particulars as set out. The Lord Chief Justice made no rule on the motion, and from his order the defendants appealed. *Held*, by the Court of Appeal (Andrews and Best, L.JJ.) that the plaintiff should deliver to the defendants further and better particulars of the nature indicated by the Court. *Field v. Catherwood, Ltd.* [C.A. 150

PRACTICE—Separate actions for negligence *arising out of the same accident—Order that actions be tried together as one action with separate issues as to damages and one set of trial costs—Jurisdiction of Court of Appeal.* Two plaintiffs brought separate actions, in respect of the deaths of their respective husbands, against the defendant for damages caused by his negligence in the driving and management of a motor car. Both actions arose out of the same accident. The plaintiffs were represented by different solicitors. An application was made on behalf of the defendant to the King's Bench Division, that the actions should be consolidated or, alternatively, that they should be tried together as one action, with separate issues as to damages. Moore, L.C.J., made an order that the actions should be tried together before the same Judge and Jury with separate relative issues. The defendant appealed to the Court of Appeal. *Held*, by the Court of Appeal (Andrews and Best, L.JJ.) that the order of the Lord Chief Justice should be varied to the extent that the actions should be tried together as one action with separate issues as to damages, and, that in the event of the plaintiffs obtaining verdicts, one set of trial costs only should be allowed to them, such costs in default of agreement to be divided equally between them. *Brady v. McDonald ; Smyth v. McDonald.* [C.A. 157

PRACTICE—Will—Construction—Trusts of Will already administered—*R. S. C.* 1905, *Order* 54a, *r.* 4 *and Order*, 55, *r.* 4. The testator had, by his will, bequeathed his farm to his grandson, W. J. W., on condition that he should reside on the farm and assist in the management thereof until he attained the age of 20 years, with a gift over to testator's son, W. W., in the event of this condition not being fulfilled. In the year 1928, W. J. W. attained the age of 21 years, whereupon the surviving trustee of the will gave him possession of the farm. On the death of W. J. W. in the year 1930, W. W. brought a summons for the construction of the will. It was contended on his behalf that W. J. W. was not entitled to the farm, under the terms of the will, by reason of the fact that he had failed to comply with the conditions of the bequest. The plaintiff further submitted that the Court had jurisdiction to determine the matter either under Order 54A, rule 4, or under Order 55, rule 4. *Held,* that the trustee of the deceased's will having administered his estate and allowed W. J. W. into possession of the farm, the question in issue was not a proper one to be determined on an originating summons either as a matter arising in the administration of the deceased's estate or upon the construction of his will. *Wightman v.Cousins & Skillen.* [Ch.D. 138

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PROBATE—Practice—Particulars—Name of Witness—Disclosure of. The defendant, in a probate action pleaded that the will which the plaintiff sought to establish was not signed by the testatrix or by any other person in her presence and by her direction. *Held,* that, as this amounted to a plea of forgery, the defendant must disclose the name of the person by whom, and the time when it was alleged that the document was signed. *Gallagher v. Kennedy.* [K.B.D. 207

RAILWAY—Passenger's luggage—Loss of—Liability of Company. The plaintiff and her sister arrived at Euston Station of the defendant's railway shortly after 5 p.m. in order to travel by the 6-10 p.m. train to Heysham. Their luggage included two dressing cases which they directed a porter to put in a carriage in which they had reserved seats. The porter carried out these instructions and placed the plaintiff's dressing case on the rack of a corridor carriage which was about the middle of the train. As the porter left, the plaintiff lifted down her case and placed it on the seat. Having removed a book therefrom, the two ladies left the carriage, without closing the door, and proceeded to a bookstall on the platform about the end of the train. Upon their return seven minutes later the plaintiff's dressing case had disappeared. *Held,* that in these circumstances the onus of proving that the loss was due to negligence on the part of the passenger lay upon the Company. And *Held,* that the plaintiff, by leaving her dressing case unprotected in a carriage with the door open, was not in the circumstances guilty of such negligence as would exonerate the Company. And *Held,* that the Company were accordingly liable for the loss. *Carr v. London Midland and Scottish Rly. Co.* [K.B. 94

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RIPARIAN OWNERS—Obstruction *placed by one riparian owner in own half of bed of river—No actual damage to lands on opposite bank—Right of action in respect of such obstruction.* The defendant, who was the owner of premises bounded by a natural river, erected on his own half of the bed and soil of the river, concrete piers and steel stanchions for the purpose of supporting a building. The erection of these piers caused an appreciable quantity of water which formerly flowed over the defendant's half of the bed of the river to be discharged and flow over the plaintiff's half and along the plaintiff's banks on the opposite side but no actual damage was thus occasioned. *Held,* that the piers and stanchions constituted an unlawful obstruction and diversion of the waters of the river, and an injunction was accordingly granted compelling the defendant to remove them. *Bickett v. Morris*, L.R. 1 H.L., Sc. 47 followed. *Orr Ewing v. Colquhoun*, 2 A.C. 839 and *Kensit v. Great Eastern Railway*, 27 Ch.D. 122 discussed. *Massereene and Another v. Murphy*. [Ch.D. 192

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teacher, the pupils attending the new school, being mainly those who had been attending the K. National School. The defendant continued in occupation of the teacher's residence notwithstanding a demand for possession, claiming to be entitled to possession without paying any rent so long as he remained principal teacher of the new Public Elementary School. The plaintiffs obtained from the County Court Judge of T., a decree for possession. The defendant appealed to the Judge of Assize who stated a case for the opinion of the Court of Appeal. *Held*, by the Court of Appeal (Moore, L.C.J., Andrews and Best, L.JJ.) that the old school having ceased to exist, the defendants contract of employment had been terminated, and the plaintiffs were entitled to a decree for possession. *The Armagh Diocesan Board of Education and Others v. Henry Mitchell.*
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On the 5th January, 1932, THE HONOURABLE DANIEL MARTIN WILSON died.

On the 12th February, 1932, THE HONOURABLE ROBERT DICK MEGAW, Judicial Commissioner, Land Purchase Commission, was appointed Judge of the High Court of Justice in Northern Ireland.

On the 3rd June, 1932, THE RIGHT HONOURABLE WILLIAM MOORE, Lord Chief Justice of Northern Ireland, was created a Baronet.

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CASES
DETERMINED BY
THE HIGH COURT OF JUSTICE
AND ON APPEAL THEREFROM IN
THE COURT OF APPEAL
IN
NORTHERN IRELAND.

IN THE MATTER OF

A charitable trust created by a codicil to the will of Matthew Forde.

THE ATTORNEY-GENERAL FOR NORTHERN IRELAND v. FORDE.

(1929. No. 181.)

Ch.D.
1930.
May 14.
June 18.

C.A.
1930.
Dec. 2.
1931.
Feb. 2, 4, 5.
March 11.

Charity—Gift to widows of persons resident on estate for five years—Private Benevolence—Absence of general charitable intention—Perpetual Trust—Cy-près.

The testator, having erected six houses for the residence of six widows who had been the wives of persons who had resided for five years on the F. estates, demised to trustees a yearly rent charge of £70 a year, charged on the townland of D., and directed them to apply the sum of £10 a year in repairing and improving the six houses, and to pay the remaining sum of £60 a year in six equal shares of £10 each to such six widows during their widowhood. He further directed that the person or persons seized of his real estate under the limitations in his will should have the sole and exclusive control of this charity, and should not be subject to the control of the Commissioners of Charitable Donations and Bequests or any other persons, but should have full power and authority when the houses should become vacant to select such widows qualified as already stated to inhabit the houses and receive the annual pension provided.

The townland of D. was sold to the tenants under the provisions of the Land Purchase (Ireland) Acts, and a sum of £2,000 was retained in Court to secure the redemption of the rent charge.

For many years past there has been a lack of qualified applicants for the occupation of the six houses and since 1913 only two of them have been occupied and the annuities of £10 have been paid only to the occupiers of such of the houses as were occupied.

Held, by the Court of Appeal (Moore, L.C.J., Andrews and Best, L.JJ.) affirming Wilson, J., that the trust was not charitable.

Per Andrews, L.J., (*a*) the codicil contained no evidence whatever of any general charitable intention and therefore the residue of the rent charge not now required by the widows named in the codicil should not be administered *cy-près* ; (*b*) Once there is established and in operation a perpetual charitable trust, then the trust property remains always charitable, and funds subject to such charity cannot revert to the donor or his representatives.

ACTION by the Attorney-General for Northern Ireland seeking for the proper administration of certain trusts.

The Attorney-General claimed :—

(*a*) A declaration that the defendant received as trustee a rent charge of £70 per annum payable out of the lands of Drumgooland in the county of Down, devised by a codicil of Matthew Forde, a former owner of the Forde estates in County Down, and was bound to apply the whole of the rent charge or of the income arising from the redemption monies, for the purposes of the charitable trust created by the codicil.

(*b*) A declaration that the defendant and his predecessors in title had been guilty of a breach of trust in failing to apply the whole of the rent charge for the purposes of the charitable trust, or, in the alternative, in failing to raise in each year the whole of the rent charge for the benefit of the charitable trust ;

(*c*) An account of the monies received by the defendant and his predecessors in title from the rent charge and the monies expended for the purposes of the charitable trust, or, in the alternative, an account of what amount of the rent charge had failed to be raised by the defendant and his predecessors in title for the benefit of the charitable trust ;

Ch.D. 1930.

THE ATTORNEY-GENERAL v. FORDE.

(*d*) Payment of the monies found to be due on the taking of such account, and that such monies might be declared to be a charge upon the townland of Drumgooland or on the purchase money thereof;

(*e*) That it might be referred to Chambers to settle a scheme for the future management of the charitable trust and, if necessary, for the application of the trust monies *cy-près*.

Matthew Forde duly executed his last will on 3rd January, 1831, by which he devised all his real estate to the trustees therein named upon the trusts declared.

On 16th April, 1831, he executed a codicil to his will, in which he recited that he had erected in the town of Seaforde, County Down, six houses for the residence of six widows who had been the wives of persons who had resided for the space of five years on any part of his estate in County Down, or on any estate in that county which should thereafter be acquired by any person in possession of his estate under the limitations of his will. He further stated that he was desirous that those houses should be kept in good and sufficient repair for ever, and that each widow who should inhabit any of the six houses should receive the sum of £10 annually. He devised for this purpose to Charles Douglass, of Grace Hall, County Down, and to his heirs and assigns for ever, a yearly rent charge of £70, charged as a first charge upon the townland of Drumgooland, County Down, this townland being part of the real estate devised by his will.

He directed that the rent charge should be paid by the persons beneficially entitled to the possession of the rents or profits of the townland under the limitations of his will. This rent charge was devised subject to a trust to apply and pay the sum of £10 a year in repairing, keeping up, and improving the six houses, and to pay the remaining sum of £60 a year in six equal shares of £10 each, to the six widows who should inhabit the six houses, during their lives, so long as they remained unmarried, but if they married again they must quit the houses and be no longer entitled to any yearly sum.

He further directed that the person or persons seized of his real estate under the limitations in his will should have the sole and exclusive control of this charity and should not be subject to the control of the Commissioners of Charitable Donations and Bequests, or any other person or persons, and such person in possession of his estates should have full power and authority, of his own judgment and discretion, from time to time, and for ever thereafter, when, and so often as, the said houses, or any of them, should become vacant, to select and choose such widows, qualified as already stated, to inhabit the houses and receive the annual pension provided.

The codicil also provided that if at any time the person or persons having power under the limitations of the will of Matthew Forde to dispose of the fee simple in the townland of Drumgooland, should so desire, it should be lawful for Charles Douglass, his heirs and assigns, to release and discharge the townland from all liability for the payment of the rent charge, upon their procuring the rent charge to be charged upon other adequate real security.

At the date of the death of Matthew Forde, the six houses had been erected in the town of Seaforde, and the townland of Drumgooland formed part of the real estate of which he was seized. The real estate ultimately became vested in William George Forde as tenant in tail made under the limitations of the will of Matthew Forde.

In or about the year 1902, the rent charge also became vested in William George Forde and Roger Hall as trustees in accordance with the provisions of the will. Roger Hall died on the 16th April, 1915, and William George Forde thereupon became sole trustee of the rent charge. William George Forde died on the 25th December, 1922, and the real estate thereupon became vested in the defendant, under the limitations of the will, and the rent charge also became vested in the defendant as trustee.

Prior to his death, William George Forde sold a portion of the real estate, including the townland of Drumgooland, under the provisions of the Land

Purchase (Ireland) Acts, and the purchase money of the sale was in pursuance of the provisions of these Acts, lodged in the Land Purchase Commission, Northern Ireland, to the credit of the Forde estate. On the allocation of the purchase money a sum of £2,000 five per cent. War Loan, 1929-1947, was retained in the Land Purchase Commission to the credit of the Forde estate for securing the redemption of the rent charge, and it was ordered that the dividends should be paid to the defendant.

For many years there had been a scarcity of qualified applicants for occupation of the six houses and since 1913 not more than two of these houses had been occupied and the annuities of £10 each have only been paid to the occupants of such of the houses as were occupied.

Since the year 1913 William George Forde, and after his death, the defendant (the repair of the houses and the payment of the annuities having been provided for) retained the balance of the rent charge, or of the interest on the purchase money payable in lieu thereof.

The *Attorney-General* (*Babington, K.C.*), *Monroe, K.C.*, and *Dougherty* for the plaintiff :

The testator indicated his intention of creating a perpetual interest by carving the rent charge out of the estate. In *Tudor on Charities* (5th edition, p. 197) it is stated : " It would seem that if there is an absolute perpetual gift to a charity, even though the trusts declared of it be only for the accomplishment of a particular charitable purpose, the subject matter is applicable *cy-près* upon failure of the trusts."

In *In re Bowen, Lloyd Phillips v. Davis* (1), where the testator by his will bequeathed two sums of money to trustees upon trust to establish schools in certain parishes, and to continue the same for ever thereafter, and declared that, if at any time thereafter, the Government should establish a general system of education, the several trusts of the legacies should cease and determine, and bequeathed the said sums of money in the same manner as he had bequeathed the residue of his personal estate, and appointed his three sisters to be his executrices and residuary legatees, it was held that the testator had made an immediate disposition in favour of charity in perpetuity, followed by a gift over of a future interest, to arise upon an event which need not necessarily occur within perpetuity limits, and that the gift over consequently failed.

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(1) [1893] 2 Ch. 491.

In the present case the testator has really transferred an estate to the trustee to be held for ever.

It was decided in *In re Slevin, Slevin v. Hepburn* (1), that a charitable bequest to an institution which comes to an end after the death of the testator, but before the legacy is paid, does not fail for the benefit of the residuary legatee, as in the ordinary case of a lapse through failure of the object in the testator's lifetime, the property in the legacy falls to be administered by the Crown and will ordinarily be applied for charitable purposes. In *Attorney-General v. Earl of Craven* (2), where real estate was vested in A. in trust, out of the rents to keep it ready for the reception of plague patients during their sickness but no longer, and for a burying-place for them, and for no other use, it was held, first, that this was a present gift to charitable purposes, and not merely a gift contingent upon the re-appearance of the plague; and secondly, that there was no resulting trust in the meanwhile for the donor or his heirs, though the plague had not re-appeared for more than 180 years. In *Aylet v. Dodd* (3) it was held that the owner of land charged with an annuity for the payment of a schoolmaster will not be excused from the payment thereof on account of there being none for six years. The Lord Chancellor compared that case "to the case of a charity for a maintenance of a select number of alms people, where notwithstanding there are not persons in a parish sufficient to answer the description of the charity, yet the land charged with the payment of the charity is not discharged during that time, but shall accumulate, and be applied towards the advancement and increase of the charity." In *In re Peel's Release* (1), Sargant, J., followed the decision of Stirling, J., " a judge of great eminence and specially conversant with cases of this character." In *The Incorporated Society for the Promotion of English Protestant Schools in Ireland v. Price* (2), by a deed reciting that it was intended that a school should be erected at A., an annuity was granted to the plaintiff society in trust to be applied to the maintenance of the said school in such manner as in such like school they should direct, A school was accordingly established, but afterwards discontinued. It was held, that the general object being charity, the annuity did not cease with the discontinuance of the particular school.

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(1) [1891] 2 Ch. 236.
(2) 21 Beav. 392.
(3) 2 Atk. 238.

We submit that a general charitable intention is to be implied from the terms of the codicil, and that there is no reverter to the successors of the donor, on the principles stated in *In re Peel's Release* (1).

Murphy, K.C., and *McDermott* for the defendant:

We submit that there is no general charitable intention. This pension was intended for widows of a very limited class. The point must be stressed that this provision was intended for widows who had been the wives of persons who had resided on the Forde estate for five years. It was never contemplated by the testator that classes of persons who had not been named in the codicil were to benefit. The class indicated by the testator in the codicil has ceased to exist. We rely on *Fowler v. Attorney-General* (3), a very strong decision as against general charitable intention. In the present case the charity was " specific and well defined " and comes within the passage in *Theobald on Wills* (7th ed. at p. 373), quoted with approval by Kennedy, L.J., in *Fowler v. Attorney-General* (3), " If the gift is for a charitable purpose, the question is, is the testator's intention to promote some specific and well-defined purpose, and that only, or is

(1) [1921] 2 Ch. 218.

(2) 7 I. Eq. Rep. 260.

(3) [1909] 2 Ch. 1.

there a general charitable intention, which the testator wishes to carry out in a particular way." We submit that the principle is so well settled that it cannot now be upset. There is a remarkable similarity between the facts in the present case and those in *In re Wilson* (1). We submit that the Attorney-General is not entitled to ask that a scheme should be sanctioned to apply money to an object, admittedly not contemplated by the testator. We submit that the passage quoted from Tudor on Charities does not apply to the facts of the present case. We rely on *In re Stanford* (2), where it was held that in the absence of any general charitable intention to be gathered from the terms of the bequest there was no room for the application of the doctrine of *cy-près*. *In re Peel's Release* (3) does not rule the present case. There, Sargant, J., was obviously dealing with a case where on the wording of the will, a general charitable intention had been established.

The Attorney-General (in reply):—

The scope of the charity will be very much limited in future unless the Court settle a scheme for the future management of the trusts and for the application of the trust monies *cy-près*. We rely on the definition given of the word "charity" by Lord Macnaghten in *Commissioners for Special Purposes of Income Tax v. Pemsel* (4), at p. 583.

The testator has declared a charitable intention, although no doubt he has limited that charitable intention. We submit that the present case resembles *In re Monk* (5).

(He also referred to *Lassence v. Tierney* (6).

Cur adv. vult.

WILSON, J.
June 18.

WILSON, J.: This action is brought by the Attorney-General to compel the defendant—the present owner of the Forde estate and also the owner of a certain rent charge charged on portion of that estate—to pay up the arrears of that rent charge and to have those arrears and any portion of that rent charge not required in future for the particular purpose for which it was created applied *cy-près* to some charitable purpose under some scheme to be settled by the Court. The foundation of the action is that by the codicil executed on the 16th April, 1831, by one Matthew Forde, a former owner of the Forde estates in County Down, it was stated that he had erected in the town of Seaforde six houses for the residence of six widows who had been the wives of persons who had resided for the space of five years on any part of the Forde estates in the county of Down or on any estate which may hereafter be acquired by and be in the possession of the person or persons who should under the limitations of his will be in possession of the testator's said estate in the county of Down when the said houses or any of them should become vacant, and further that he was desirous that said houses should be kept in good repair for ever, and that each widow occupying one of them should receive the sum of £10 a year payable half-yearly on each 1st May and 1st November. Then for the purpose aforesaid he created and devised to one Charles Douglass his heirs and assigns a yearly rent charge of £70 a year to be paid half-yearly on 1st May and 1st November, and he charged same on the townland of Drumgooland with the usual powers of distress and entry to secure the same, and directed that same was given subject to the following trust, viz., in trust to apply and pay the sum of £10 a year in repairing and improving the said six houses, such sum to be laid out and expended under the sole management, direction and control of the person for the time being in possession of his real estate in the county of Down under his will and in trust further to pay the remaining sum of £60 a year in six equal shares of £10 each to such six widows aforesaid during their lives so long as they remain unmarried, but if they married they must quit the houses and be no longer entitled to any yearly or half-yearly sum, and he further directed that the person or persons seized of his real estate under the limitations in his will should have the sole and exclusive control of the said charity and should not be subject to the control of the Commissioners of Charitable Donations and Bequests or any other person or persons, and such person in possession of his said estates should have full power and authority of his and their own judgment and discretion from time to time and for ever thereafter when and so often as the said houses or any of them should become vacant to select and choose *such widows qualified as aforesaid* to inhabit and dwell in said houses and receive the annual pension hereinbefore provided as they, the persons so seized of his real estate as aforesaid, should think fit and proper. Drumgooland has been sold to the tenants in the Land Commission Court and a sum of £2,000 retained in Court to meet (inter alia) the said rent charge of £70.

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(1) [1913] 1 Ch. 314.
(2) [1924] 1 Ch. 73.
(3) [1921] 2 Ch. 218.
(4) [1891] A.C. 531, 583.
(5) [1927] 2 Ch. 197.
(6) 1 Mac. & G. 551.

By his will the said Matthew Forde settled his estates in County Down, including the said six houses, in strict settlement, and there is no charitable intention expressed in his will or codicils save the provisions in his said codicil already stated.

In reading this codicil, I have come to the conclusion that the only intention the testator had was to benefit :

(*a*) widows of persons who had resided for five years on any part of his estates in Down or on any other estate which his successors in the Down estates might acquire elsewhere.

(*b*) his successors alone were to select the widows to benefit from amongst the qualified widows.

(*c*) his successors were to have the laying out of the £10 a year for the upkeep of the six houses.

(*d*) the testator was of opinion—

    (i) that the six houses would last for ever (and says so) ;

    (ii) that the supply of qualified widows would last for ever ; and

    (iii) that his successors in the Down estates would flourish for ever and be able to select qualified widows in cases of vacancy for all time.

(*e*) the testator consequently created a perpetual rent charge to carry on what he believed would be a perpetual trust or charity for the benefit only of these qualified and selected widows.

The testator's expectations have not proved correct. The greater part of his agricultural estates in county Down have been compulsorily sold and expropriated from his successors. Since 1913 six qualified widows have not been obtainable to enjoy his bounty and only one or two qualified and selected widows can be got to inhabit the houses, and though the £10 a year has been regularly expended on the repair of the houses, only some £20 or £30 has been paid to two or three widows inhabiting the houses.

In these circumstances the Attorney-General insists that this was a perpetual charity and as the original objects are not sufficient to exhaust the fund, the charity must be enlarged to embrace other charitable objects within the testator's general charitable intentions, and if there are none such, *cy-près* under the direction of the Court. It is further contended on his behalf that a new principle has been discovered and laid down by the present Master of the Rolls in England, Lord Hanworth, viz., that where a perpetual rent charge or a sum of money has been created or absolutely given and devoted to any particular charitable object and that particular charity fails by reason of some condition subsequent, the Court must seize hold of the money and devote it in future to some other charitable object under the direction of the Court. The case cited for this proposition is *In re Monk* (1). I have read the case and no doubt Lord Hanworth says that it was suggested by Counsel and he adopted the suggestion that whenever a particular charity fails by reason of a condition subsequent as distinguished from a condition precedent, the charitable fund must continue to be devoted to some charitable purpose by the Court. However, the Master of the Rolls did not decide the case on this principle, but devoted the larger part of his judgment to demonstrating that the particular charity mentioned might yet exhaust or require the whole fund to carry it out, and also that there was a general or paramount charitable intention expressed in the will, and both the Lords Justices did likewise. If the principle of the failure by condition subsequent were universally applied, a testator who set aside a sum of £5,000 for the education of his poor nephews and nieces and gave any surplus not required for that purpose to his residuary legatees would find that if there were no poor nephews and nieces, his residuary legatees would get the £5,000, but if there were one or two poor young nephews and nieces who got their education for any period, however short, after his death out of the fund and then died, the charity would fail by a condition subsequent, and the entire fund would be brought into this Court to be administered *cy-près*. But *cy-près* to what or to whom ? Would it not go to educate any or all poor persons or only poor nephews and nieces of testator's relatives or some selected poor nephews or nieces of other persons not related to the testator ? Meanwhile, what would become of the testator's expressed intention that the balance left after supplying the particular education directed should go to his residuary legatees ?

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(1) [1927] 2 Ch. 197.

I have always understood that the law was that a testator could leave his property by will to whomsoever he liked and in any way he liked provided he did so without infringing any rule of law, and that the duty of the Court was simply to read the will, find out what it meant, and carry out that meaning so far as it was not contrary to law. In *Fowler v. Attorney-General* (1), Vaughan Williams, L.J., said no Court has ever thought it right to be benevolent with a testator's money contrary to the plain intention of his will. Having regard to some of the old cases, perhaps this goes too far. Lord Eldon in *Attorney-General v. The Mayor of Bristol* (2), and other cases spent a lot of energy in criticising and examining the older cases and shewing that the true principle is to ascertain the donor's intention and carry that out, and that the Court had gone too far in creating charitable purposes which the donor never intended. In *Fowler v. Attorney-General* (1), Kennedy, L.J., said " if the gift is for a charitable

(1) [1909] 2 Ch. 1.

(2) 2 Jac. & W. 294.

purpose the question is, is the testator's intention to promote some specific and well-defined purpose and that only, or is there a general charitable intention, which the testator wishes to carry out in a particular way?" If there is only the specific purpose, the balance unexpended is undisposed of but if there is also a general charitable intention it will be applied *cy-près* to the expressed general charitable intention. Farwell, L.J., says " It is well settled law that a legacy may be given to a charity upon a condition, which condition may be express or implied, precedent or subsequent. I say this because in argument it was suggested that there had been a breach of trust; but I can see no breach of trust in the executors having paid over this money on a *condition subsequent.* They might well have thought that the scheme would be carried into effect; now that it has totally failed, they are entitled, in my opinion, to have the money back again." This Lord Justice thought, apparently, that even where the charitable gift failed by the non-fulfilment of a condition subsequent, it could not be applied *cy-près* but must go back to the estate when the will expressed no general charitable purpose. Parker, J., in *In re Wilson* (1), at p. 321, said: "I have to determine whether the gift in this will, which is in form a particular gift, is a gift really for a particular charitable purpose, and for that purpose only, or whether there is a paramount intention to be gathered from the will that the money shall in any event be applied for some more general charitable purpose even if the particular mode of application which is prescribed cannot be carried into effect." He adds, what is also admitted to be true in the case before me: " one of the peculiarities of this case is that there is nothing as far as I can gather in any other part of the will which throws any light upon the question, and I simply have to consider what is the construction of the gift, which is in itself a particular gift." In that case the charitable gift failed, as it seems to me, by matter subsequent, viz., that when the gift vested in the testator's trustees on trust to pay the interest thereon to a schoolmaster as part of his salary, the particular school arranged for could not be built, and no suggestion was made that it must be applied *cy-près*.

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(1) [1913] 1 Ch. 314, 321.

In *Bowman v. Secular Society, Ltd.* (1), at p. 442, Lord Parker says: "the rule of equity as to a general charitable intention is well known and, however admirable in the interests of the public, has, I think, gone further than any other rule or canon of construction in defeating the real intention of testators." He then refers to *De Costa v. De Paz* (2), where a Jewish testator left money for a school to teach the Jewish religion, and the Lord Chancellor of the day did not decide that the bequest was illegal and void and therefore went to the next of kin, but that there was a general charitable bequest for religious purposes and *cy-près* he applied the Jew's money to pay a preacher to teach the Christian religion. Lord Eldon wondered what the testator would have thought if he had heard the result. This perhaps is the high water mark of judicial charity and is a warning to all future judges to beware lest they may use the rules of law and construction to carry out—not the testator's intention but their own subconscious prejudices.

Lord Parker clearly recognises again that his statement in *In re Wilson* (3), was correct, and if the particular charitable purpose failed for any reason—precedent or subsequent—the charitable fund remained undisposed of, unless there was a paramount general charitable intention expressed in the gift, deed or will creating the charity. Most of the Law Lords adopted Lord Parker's judgment as correct, and nowhere in the House of Lords cases can I find anything to sustain the new principle enunciated by Lord Hanworth. It seems most improbable that after centuries of reports of charity cases it should be possible for any counsel or judge, however inspired, to invent a new sound principle on which to decide the proper construction of charitable gifts and at the same time over-rule the

(1) [1917] A.C. 406.
(2) 2 Swanst. 487 ; note (*a*) ; Amb. 228.
(3) [1913] 1 Ch. 314

oft-reiterated rule that the donor's intention as expressed in his deed or will is the guiding principle.

I would willingly follow Lord Hanworth's decision in this case and decide in favour of the plaintiff but for the fact that it would not be in accordance with the only intention expressed in the testator's codicil, to wit, his intention to benefit certain qualified and selected widows and no others. Further, if the charity is to be enlarged and the fund applied *cy-près*, it must be given to objects as nearly as possible like the objects the testator mentioned. Is it to be given to widows of persons who resided less than five years on his successors' estates, or to widows of persons who resided five years on any part of what was once testator's estates or to widows generally ? The only ground for suggesting a general charitable intention in this case is that the rent charge was made perpetual. That might be the foundation of an argument in a case where the testator contemplated that the particular objects must fail in a certain time and there was no reason except general charity for creating a perpetual rent charge. Here the testator clearly thought that the qualified and selected widows would never fail and for that reason he had to create the perpetual rent charge. I am therefore of opinion that when and so far as the particular objects fail, the balance of the rent charge remains undisposed of and merges in the inheritance as no paramount general charitable intention is expressed in the will and codicil, and therefore this action fails and must be dismissed, but, by consent of the defendant, without costs.

I should add that, though the testator calls this trust a charity, in my judgment it is not a charity in the legal sense. Widows *per se* are not within the preamble of the Statutes of Elizabeth or Charles dealing with charities. They are not necessarily poor, or religious or educational objects, or for the public benefit. There is nothing in the gift confining the owners of the estate to the selection of *poor* qualified widows, and they may select any qualified widow no matter how well off she may be. In *Browne v. King* (1), Sir

(1) 17 L.R.I. 448.

Andrew Porter, M.R., decided that a gift of the rents of the testator's property to trustees to pay same to the parish priest of a certain parish to be applied by him for the benefit of the children under twelve years of age of the tenantry of the testator in such manner as the parish priest should deem advisable was not a good charitable trust and that the lands were not bound by the trust and went to the testator's heir at law. This case is clearly binding on me and it follows that this rent charge is simply a perpetual trust and not a charitable trust, and therefore not enforceable save so far as the successive owners of the Forde estates choose of their own bounty to carry it on.

I therefore give judgment for the defendant and order the action to be dismissed but without costs as hereinbefore stated.

The plaintiff appealed to the Court of Appeal (1).

When the appeal first came before the Court of Appeal for hearing the question was raised by the members of the Court as to whether or not it was necessary that the trustee for the rent charge should be represented. The Court reserved their decision on this point, and decided that the arguments should proceed. At the close of the first day's hearing, the Lord Chief Justice announced that the Court had decided that the trustee for the rent charge should be represented. An adjournment took place to enable this to be done. At the subsequent hearings the trustee for the rent charge appeared by counsel.

The Attorney-General (*Babington, K.C.*), *Monroe, K.C.*, and *Dougherty* for the appellant :

There is no plea in the defendant's defence that this gift to widows is not a " charity." The testator used the word " charity " and provided that the persons who for the time being should be seized of his real estate in the county of Down under the limitations in his will should have the sole and exclusive management and control of the "charity," and that they should not be subject to the control or interference of the Commissioners of Charitable Donations. He certainly recognised that this was a charity. We rely on *Attorney-General v. Comber* (1), where a bequest to the widows and orphans of the parish of L. was held a good charitable bequest. We submit that the words used by the vice-chancellor (Sir John Leach), in his judgment in that case, apply to the present case. *The Attorney-General v. Comber* (1) was a case of general benevolence to a certain class. It was followed in *Thompson v. Corby* (2), and was considered and followed in *Re Dudgeon, Truman v. Pope* (3). We submit that this is a good charitable bequest. This charity has failed partially, after having been put into operation, because there are not enough objects of the charity forthcoming. We submit that in so far as it has failed, a scheme should be settled to apply the trust monies *cy-près*. Once a charitable gift takes effect, the property can never revert to the estate, except in one or two special cases, of which the present is not one. (See *Halsbury, The Laws of England*, vol. 4, par. 266.)

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(1) In the Court of Appeal before Moore, L.C.J., Andrews and Best, L.JJ.

Where there has been a lapse or failure of a gift for charitable purposes, if a general charitable intention is to be gathered from the will, the property will be applied *cy-près*, notwithstanding failure or lapse. The present case is altogether different from the case where the charity has never come into operation. We submit that *In re Slevin, Slevin v. Hepburn* (4), is a direct authority in favour of the Crown in the present case. Once bounty has been shown towards the members of a class, all the elements of a " charity " are present. We rely on the statement of the law contained in *Halsbury, The Laws of England*, vol. 4, par 341. We rely on *In re Soley-Grover v. The Draper's Company* (5), where *In re Slevin, Slevin v. Hepburn* (4) was followed. These cases decide (*a*) that once a charity comes into existence, the gift taking effect, and the objects of the charity being in existence, the property can never revert to the next of kin; and (*b*) that if the charitable gift is perpetual, there can be no reverter or resulting trust in event of failure of objects. We rely on the words used by Sargant, L.J., in his judgment in *In re Monk, Giffen v. Wedd* (1), at p. 212, with reference to the effect of a charity having actually been put into operation. We submit that the decisions in *In re Slevin, Slevin v. Hepburn* (2), and in *In re Monk, Giffen v. Wedd* (1), are conclusive. The statement of the law contained in *Tudor on Charities* (5th ed.) at p. 197, is, we submit, correct. We rely on *The Incorporated Society for the Promotion of Protestant Schools in Ireland v. Price* (3), and on *In re Peel's Release* (4).

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(1) 2 Sim. & St. 93.
(2) 27 Beav. 649.
(3) 74 L.T. 613.
(4) [1891] 2 Ch. 236.
(5) 17 T.L.R. 118.

There is no reported case in which once a charity has come into existence, there has been held to be any resulting trust in favour of the person beneficially entitled to the estate. Once a charity is working, then whether there is a general charitable intention or not, in the event of a lapse the property must be applied *cy-près.*

It is clear from the authorities that a gift to widows is a good charity, because the law supplies the word "poor," *Attorney-General v. Comber* (5), *Thompson v. Corby* (6), *Truman v. Pope* (7).

Assuming that the gift was not charitable, then it was void from the start as creating a perpetuity.

There being a clear intention to benefit a class, it does not matter how limited that class may be. *In re King, Kerr v. Bradley* (8), shows how absolute the rule is, the surplus remaining in the hands of the trustees must be applied *cy-près.* The motive of the testator in making the gift is immaterial for the purpose of deciding whether the gift is charitable or not. We rely on *Aylet v. Dodd* (9). In *In re Geikie-Robson v. Patterson* (10), it was held, applying *In re Slevin* (2), that where a gift was left by will to trustees to apply the income for charitable purposes which are in existence at the

(1) [1927] 2 Ch. 197, 212.
(2) [1891] 2 Ch. 236.
(3) 7 Ir. Eq. Rep. 260.
(4) [1921] 2 Ch. 218.
(5) 2 Sim. & St. 93.
(6) 27 Beav. 649.
(7) 74 L.T. 613.
(8) [1923] 1 Ch. 243.
(9) 2 Atk. 238.
(10) 27 T.L.R. 484.

death of the testator, but the specific purposes cease to exist before it is paid over, the gift is applicable to charitable purposes *cy-près*.

The Attorney-General v. Duke of Northumberland (1) would have been followed by Wilson, J., if he had pursued a true analogy.

In re Wilson, Twentyman v. Simpson (2) does not govern the present case.

Murphy, K.C., and *MacDermott* for the respondent :

In Browne v. King (3) the Master of the Rolls said : "*In the Attorney-General v. Comber* (4) a bequest to the widows and orphans of a parish was held to be a good charitable bequest. Sir John Leach said that the gift could not in its nature have proceeded from general benevolence to particular individuals ; it must have proceeded from general benevolence towards two classes who were suffering under a common circumstance of destitution or privation, and is necessarily to be confined to such of those two classes as are within the scope of general benevolence, and he acted upon this bequest as if the expression had been to the poor widows and orphans of Lindfield and declared this to be a charitable use." We rely on *In re Cullimore's Trusts* (5).

In *Kendall v. Granger* (6) a bequest of personalty to trustees, to be "applied for the relief of domestic distress, assisting indigent but deserving individuals, or encouraging undertakings of general utility" was held void as a charitable bequest. In *Nash v. Morley* (7), a gift to be divided "among poor pious persons male or female, old or infirm, as the executors see fit, not omitting large and sick families if of good character," is a valid charitable bequest, the word poor extending through the whole sentence, but there is nothing in the gift in the present case to impart the suggestion of poverty. Although the question of the gift not being a charity was not pleaded in the defence, nevertheless

(1) 7 Ch. D. 745.
(2) [1913] 1 Ch. 314.
(3) 17 L.R.I. 448.
(4) 2 Sim. & St. 93.
(5) 27 L.R.I. 18.
(6) 5 Beav. 300.
(7) 5 Beav. 177.

this question goes to the root of the matter, and if the gift were not a charity this court would have no jurisdiction to entertain this appeal.

If there is no general charitable intention manifested in the will then the *cy-près* doctrine cannot be applied to the gift. We rely on the judgment of Parker, J., in *In re Wilson, Twentyman v. Simpson* (1), *In re White's Trusts* (2) in which a lapsed fund was not applied *cy-près* is strongly in favour of the respondent.

[ANDREWS, L.J. : But that is a case of initial lapse.]

In Fowler v. Attorney-General (3), the fund had been started in the testator's lifetime, it was held affirming the decision of Joyce, J., that the legacy was a gift to take effect upon the happening of a condition which had failed ; that there was no general charitable intent to be gathered from the will, and that the legacy must be repaid to the executors. We rely on the words used by Neville, J., in *In re Packe, Sanders v. Attorney-General* (4), where he said that he could not put the question he had to decide better than it was put by Parker, J., in the case of *In re Wilson* (5). It was held in *In re Packe, Sanders v. Attorney-General* (4) that the *cy-près* doctrine was not applicable where the directions of the testator could not be carried out, and no paramount charitable intention was implied by the will. *In re Stanford* (6) is a clear decision in favour of the proposition contended for on behalf of the respondent.

In re Welsh Hospital (*Netley*) *Fund, Thomas v. Attorney-General* (7), was a case in which the charity came into existence and remained in existence for a considerable time, and it was held that there was a general charitable intention which enabled the Court to apply the fund *cy-près*. If the Attorney-General's argument that once a charity comes into existence there cannot be a resulting trust, is correct, it would not have been necessary to determine the matter which was deter-

(1) [1913] 1 Ch. 314.
(2) 33 Ch. D. 449.
(3) [1909] 2 Ch. 1.
(4) [1918] 1 Ch. 437.
(5) [1913] 1 Ch. 314, 320.
(6) [1924] 1 Ch. 73.
(7) [1921] 1 Ch. 655.

mined in this case. We also rely on *In re Randell, Randell v. Dixon* (1) and on *In re Blunt's Trusts, Wigan v. Clinch* (2).

McNeill for the trustee for the rent charge:—

This is a public charitable trust, the idea of poverty is not necessary. I submit that the following cases are in point, *In re Christ Church Inclosure Act* (3), *Clark v. Taylor* (4), *Thompson v. Shakespear* (5), *Hoare v. Hoare* (6).

The Attorney-General (in reply):—

The fact that the widows are to receive £10 per year, if nothing else in the will, imparts the idea of poverty.

Cur. adv. vult.

MOORE, L.C.J.
March 11.

MOORE, L.C.J.: This appeal is conversant with the trusts created by the codicil, dated 16th April, 1831, to the will of Matthew Forde, late of Seaforde, in the county of Down.

I find that these trusts are correctly set out in paragraphs 2—5 of the Statement of Claim. [His Lordship then read these paragraphs.]

The Attorney-General did not in his long and interesting argument before us make any concession and is not to be taken as having done so. Three-fourths of his argument went to establish the proposition that if these trusts constituted a charity, whether public or particular, they must be continued under the doctrine of *cy-près* to be applied to charitable purposes other than the original objects if such should fail. For this proposition he relied on the cases of *In re Slevin* (7), *In re Peel's Release* (8), and *In re Monk* (9).

But it is open to observation that the learned Attorney-General would not have been forced into the

(1) 38 Ch. D 213.
(2) [1904] 2 Ch. 767.
(3) 38 Ch. D. 520.
(4) 1 Drew. 642.
(5) 1 De G. F. & J. 399.
(6) 56 L.T. 147.
(7) [1891] 2 Ch. 236.
(8) [1921] 2 Ch. 218.
(9) [1927] 2 Ch. 197.

somewhat difficult field of this branch of the law, had he been able to show that the codicil in question contained a general charitable intention (as distinguished from a particular), for if it did so the doctrine of *cy-près* would at once apply, without more, on failure of the objects, and it would have been unnecessary for him to go further. I do not think it is required to quote authority for this proposition, because the Attorney-General is practically in the position that he is obliged to concede, short of actual admission, that this is a particular or private charity. But, if it is not a public charity, there may be a very fine distinction between a private or particular charity and a private trust which is not in the legal sense a charity at all. And, if he fails to satisfy us in the first instance that there is some such charity, then his whole case must fall to the ground, not only as regards his own proposition but of course as to the application of the theory of *cy-près*.

Is this, then, a charity in the legal sense ? The learned Judge has dealt very fully with this in his judgment, with which I respectfully concur. I have read *Aylet v. Dodd* (1), a case of 1741, and *Bristow v. Bristow* (2), cited to us in argument, both of which I found in *Bacon's Abridgement* (title "Charitable Uses and Mortmain," sub-division E.), and many of the other cases to which Counsel have referred us in the course of the present argument, including in particular the two Irish cases of *Browne v. King* (3), and *In re Cullimore's Trusts* (4), both decisions of the late Sir Andrew Porter when M.R.

I do not think it would be profitable, after the careful examination of these cases to be found in the judgment appealed from, as well as the several cases quoted to us and to which Sir Andrew Porter refers, to repeat the conclusions arrived at as to the law on this subject generally by the Master of the Rolls, but I will summarize them in my own words.

Outside the Statute of Elizabeth, to make mere benevolence into a legal charity there must either be

(1) 2 Atk. 238.
(2) 5 Beav. 289.
(3) 17 L.R.I. 448.
(4) 27 L.R.I. 18.

in the document creating the trust an obvious desire to relieve poverty, expressed in terms, or the document must contain material for a necessary inference—not a possible one merely—from its terms that the relief of necessitous persons and none other was intended. Without such expressions, or such necessary inference, the Court will not go outside the document for an interpretation which would extend the trust, as I have said, from private benevolence to a legal charity for persons necessarily poor.

Now is the trust in this codicil private benevolence or a private charity ? In my opinion it is merely the first. This gentleman was a leading landowner among the gentry of the county Down. He had his demesne and estates at Seaforde and was more or less of a county magnate. He evidently considered that it would be for the benefit of residents on his estate and probably add to the importance of the estate, and indirectly to that of the Forde family, if six widows connected for some years with the Seaforde estate apparently irrespective of their means were selected from time to time to be maintained as pensioners on the bounty of the Forde family *in perpetuum.* But the outstanding matters to my mind are the provisions for the perpetual direction and control of these houses by the Forde family. The preservation of such control free from the outside interference of any person, including even the Commissioners of Charitable Donations and Bequests, seems to me to be the leading aim to which the charity itself would always be subordinate. In my opinion, weighing carefully all the circumstances in the case, the absence of any words implying poverty on part of the recipients—I pass over the incidental use by the testator in a solitary passage of the actual word charity—and the whole tenor and object of the trusts created by this codicil, no charity in the legal sense was created by it.

This is of itself enough to determine this appeal. I think the learned Judge was right on this aspect of the case and that his judgment should be affirmed.

Although this ground is taken by him in his judgment, yet it was not raised in the pleadings and we ought to hear counsel on the question of costs.

MOORE, L.C.J.

On the question argued at so much length before us based by the Attorney-General in the main on the three cases I have already referred to, I find much difficulty. I find it hard to reconcile with them *In re Wilson* (1), and *In re Stanford* (2), I do not think *In re Slevin* (3) is an authority for such a far-reaching proposition as the Attorney-General has attempted to establish. I think it is merely an authority on the question of lapse. I notice that it is not referred to in the admittedly important cases of *In re Peels' Release* (4), *In re Monk* (5), or *In re Stanford* (2). It is true that Kay, L.J., in the judgment of the Court says that the judgment does not go on the grounds of the application of the *cy-près* doctrine, but that was because the Attorney-General was in possession and would administer under his own jurisdiction. I do not think that there is anything in that judgment to alter the existing law as to the scope of the *cy-près* doctrine, which has been recognised in most of the subsequent cases I have referred to.

I think *In re Slevin* (3), *In re Peel's Release* (4), and *In re Monk* (5) on the one hand, and *and In re Wilson* (1) and *In re Standford* (2) on the other, appear to represent two rival schools of legal thought. It is not necessary for the purpose of this judgment that I should go out of my way to express any opinion on this divergence of view, and I do not do so, reserving to myself the right, should the question subsequently arise, to express a free and unfettered opinion thereon.

ANDREWS, L.J.

ANDREWS, L.J. : To this action, which is brought to obtain certain declarations regarding a rent charge impressed with an alleged charitable trust and for the settlement of a scheme *cy-près*, the first answer advanced in argument before us was that the trust was not charitable, and that the Attorney-General had no right to maintain the suit.

The relief of poor people is among the objects expressly enumerated in the preamble to the Statute of Elizabeth ; and gifts for the benefit of the poor generally,

(1) [1913] 1 Ch. 314.
(2) [1924] 1 Ch. 73.
(3) [1891] 2 Ch. 236.
(4) [1921] 2 Ch. 218.
(5) [1927] 2 Ch. 197.

or for the poor of a particular parish or place, have frequently been held charitable. Thus, to take only one illustration, in *Bristow v. Bristow* (1), a gift by will of a fund to apply the income "for the relief of the poor on my little estate in Suffolk" was held charitable —not, it is to be observed, because the objects of the trust were tenants of the testatrix, for she had in fact only a rent charge on the estate, but because they were poor.

The authorities have further established beyond all question that it is not essential in such cases that the relief of poverty or distress should be expressed in terms as the object of the gift. Such intention on the part of the donor may be implied from the nature of the gift looked at as a whole. Thus, in *Re Dudgeon, Truman v. Pope* (2), where a gift was made to a rector and churchwardens of a parish, the income of the fund to be distributed "amongst respectable single women of good character above the age of sixty years to be paid by monthly instalments, but so that no recipient shall receive more than £10 per annum," it was said by Stirling, J., in holding the gift good as a charitable bequest:—"I quite agree with the proposition of law stated on behalf of the next of kin, that if objects as defined by the testator go beyond those defined by or by analogy to the Statute of Charitable Uses the gift is bad. But it appears to me that the cases cited on behalf of the charity do show this that it is not absolutely necessary to find poverty expressed in so many words, but that the court will look at the whole gift, and if it comes to the conclusion that the relief of poverty was meant, will give effect to it, although the word 'poverty' is not to be found in it." It is on this view alone that the decision in the cases of *Attorney-General v. Comber* (3), and *Thompson v. Corby* (4), can be explained and upheld. The decision of Stirling, J., in *Re Dudgeon* (2) was approved of and followed by Parker, J., in *Re Elliott; Raven v. Nicholson* (5), where, in holding a gift for blind persons charitable, he said

(1) 5 Beav. 289.
(2) 74 L.T. (N.S.) 613.
(3) 2 Sim. & St. 93.
(4) 27 Beav. 649.
(5) 102 L.T. 528.

that it was clear that the objects of the gift were persons in need of relief implying such a degree of poverty as would bring them within the ordinary doctrine of the Court and make them proper objects of charity. It is unnecessary to look further than the judgments of these two learned Judges in support of the Court's right in clear cases to imply the relief of poverty as the motive of the gift, and so to declare the gift charitable.

I am quite unable to accept the submission of the learned Attorney-General that "the word 'Widows' necessarily imports poverty," so that the gift of a fund or of an annual charge for the benefit of widows must be a good charitable gift. Not only is such a contention contrary to fact, but it is also important to note that, whilst the Statute of Elizabeth, in its enumeration of charitable objects, expressly mentions the education and preferment of orphans, it contains no reference whatever to widows. It is necessary for us, therefore, to look closely at the terms of the codicil to see if it contains any words from which we should draw the clear inference that, although it is not expressly stated that the selection must be made from amongst "poor widows," yet the testator must be taken to have intended that only poor widows should benefit ; that his object was the relief of poverty ; in a word that his motive was charity, not mere benevolence. *The Attorney-General v. Comber* (1), *Powell v. Attorney-General* (2), and *Thompson v. Corby* (3), are all cases in which, although the word "widows" was not qualified by the adjective "poor," the Court, looking at the gifts as a whole, was able to uphold their charitable character. The several wills under which the bequests were made contained words or phrases which indicated clearly that the gifts could not have proceeded purely from motives of general benevolence to particular individuals, but rather from a charitable desire to relieve poverty or destitution.

That our Irish Courts will not unduly extend the principle of implying the motive of relief of poverty is apparent from the decisions of Porter, M.R., in *Browne*

(1) 2 Sim. & St. 93.
(2) 3 Mer. 48.
(3) 27 Beav. 649.

v. King (1), and *In re Cullimore's Trusts* (2). In the former case, in which under the trusts of a deed a Roman Catholic clergyman was directed to apply rents and profits for the benefit of the children under the age of twelve years of the tenantry of the grantor, the Master of the Rolls said that there was nothing to guide him in deciding that the gift was for children of poor persons, or persons in great need. In the latter case a direction to the Commissioners of Charitable Donations and Bequests to apply the balance of interest on a sum bequeathed to them for the benefit and maintenance and to enable the families of his late workmen at B. or their children to become apprenticed or to emigrate abroad, the Master of the Rolls said that there was nothing to show that the persons whom the testator meant to benefit were to be poor persons. Twenty years had elapsed between the time that the testator was at B. and the date of his will. Further, "to be a workman," he declared, "is not necessarily to be necessitous." There was, he said, no expression or context indicating the poverty of the objects of the gift as a qualification, and this was in such a case a necessary element to constitute a charitable purpose.

I have very carefully considered the terms of the codicil of Matthew Forde, the testator in the present case, and I have come to the clear conclusion that it would be a much weaker case in which to imply the element of poverty than either of the Irish cases to which I have just referred. In neither recital nor devise can I find any words which would necessarily exclude a widow in comfortable circumstances from benefit. It is true that the houses are to be kept in repair with portion of the rent charge, but that is only natural in the case of houses which he had himself built near the entrance gate of his demesne. It is also true that the smallness of the grant to each widow—£10 a year—suggests that the intended recipients would not be in affluent circumstances. We must remember, however, that money had a very different value one hundred years ago from what it has to-day; and there can be no doubt that it would have been

(1) 17 L.R.I. 448. (2) 27 L.R.I. 18.

then at least as much as it would be now a welcome and acceptable addition to the income of many a widow who could not be said to be suffering from such a degree of poverty as to render her a legitimate object of charity. I am further of opinion that, if the testator had in contemplation as objects of the gifts only those who were in really necessitous circumstances, he would probably have provided for the payment of the annuities at more frequent intervals than half-yearly as directed in his will. No doubt he wished to benefit those who would be helped by it, but that may be mere benevolence ; it is not necessarily charity ; and nowhere can I find any word, phrase, or context in the codicil which would render it a breach of trust if a widow were selected as an occupant for a vacant house who, either then or subsequently whilst permitted to remain in occupation, enjoyed a measure of financial independence which made her in no sense an object of charity. The only two essential conditions which selected objects of the trust must comply with are :—(*a*) They must be widows : and (*b*) their husbands must have resided on the estate for five years.

The private character of the testator's benevolence is further manifest. In the first place the sum of £10 a year for repairing and improving the houses was, by the codicil, to be expended under the sole direction of the owner of the estate. Not even the trustee to whom it was payable as part of the rent charge of £70 had any voice in how it should be spent. By a subsequent clause the owner of the estate for the time being had conferred upon him "the sole and exclusive management and control of the said charity" ; and the testator declared that such owner should "not be subject to the control or interference of the Commissioners of Charitable Donations and Bequests or any other person or persons body or bodies corporate or politic." It is further provided that such owner should have full power and authority on his own judgment and discretion to select the widows to inhabit the houses and receive "the annual pension." The learned Attorney-General stresses the use of the word "charity" by the testator ; but this word is as consistent with mere private charity as it is with public charity. I think the testator's designation in this clause of the annuity as "the annual pension" affords perhaps a stronger argument, but in my opinion it is in itself quite insufficient to constitute the trust a public charity. The whole tenor of the clauses to which I have referred is the settled determination of the testator that, whilst providing houses and annuities for estate widows, the entire management and control of the trust should be and remain in the hands of the owner of the estate without any interference or control by any other person or authority, including the Commissioners constituted by statute as the guardians of charities. In a word, it was created, and has necessarily remained for almost a century, an entirely private estate trust or charity. As such, abuses or breaches of trust may be controlled by the Court of Chancery not under its charitable, but under its general jurisdiction in regard to trusts. Such proceedings should not be instituted and cannot, in my opinion, be maintained by the Attorney-General who represents the public; and the doctrine of *cy-près* is inapplicable to such trusts.

This is sufficient to determine the present case against the plaintiff; but, as the point which I have been considering, though properly raised by the learned Judge at the trial as going to jurisdiction, was not pleaded, I feel that in case our decision upon it should be tested in the House of Lords, that Court, as also the parties themselves, are entitled to have our judgment on the issues raised in the pleadings. I am also of opinion that it is necessary to determine them in order to arrive at a proper decision in regard to costs. On these issues we have heard full argument, and upon them I have formed a clear opinion. In the circumstances I shall, however, deal much more briefly with them than I otherwise would have done.

In the first place the Attorney-General argues that the terms of the testator's codicil manifest a general charitable intent, and that the residue of the rent charge not now required for the widows named in the codicil should be administered *cy-près*. Such general charitable intent is held to exist where the terms of the gift taken as a whole are indicative of a paramount charitable purpose, the particular object named being only a direction grafted on to the gift indicating the desire of the donor as to the mode of carrying it out. In such a case where the mode fails, the object—general charity—remains. In the present case I am satisfied that the codicil contains no evidence whatever of any such general charitable intent. The one object the testator had in his mind was "estate widows"; and I have no doubt whatever that if his voice could now be heard, it would be in indignation at the thought that his inheritance should be burdened with a charitable trust in favour of objects who either were not widows or whose deceased husbands did not possess the residential qualification on the estate which he had specifically mentioned. On this point also I am, accordingly, against the Attorney-General.

The third point which he has advanced is that, as this was not a case of initial failure or lapse but one in which a perpetual trust had come into actual operation, the trust could never cease; and that, even though he failed to establish a general charitable intent, the Court should, on total or partial failure of objects, administer the fund *cy-près*. This was the point mainly argued before us, and upon it I have no hesitation in holding with the Attorney-General. In my opinion once there is established and in operation a perpetual charitable trust, then the trust property remains always charitable, and funds subject to such charity cannot revert or result to the donor or his representatives. To hold otherwise would in my opinion be to express our disapproval of *In re Slevin, Slevin v. Hepburn* (1), *Peel's Release* (2), and *In re Monk, Giffen v. Wedd* (3). Where a charity is in existence at the death of a testator the legacy, as Kay, L.J., puts it, by that very fact becomes impressed with charity which the residuary legatee cannot get rid of. As in the case of a legacy to an individual, lapse can only occur by failure of the object in the life-

(1) [1891] 2 Ch. 236.
(2) [1921] 2 Ch. 218.
(3) [1927] 2 Ch. 197.

time of the testator. A legacy given on a perpetual trust becomes the property of the charity; and on its ceasing to exist, its property, quite independently of general charitable intention, falls to be administered by the Crown. No doubt, if, as in *In re Randell* (1) and *In re Blunt's Trusts* (2), the gift to the charity was stated to be for a term or a limited or conditional period only, the principle which I have stated would not apply, for a reversion would be left in the donor. The judgment of Parker, J., in *In re Wilson* (3), so strongly relied upon by Mr. Murphy, does not in my opinion conflict with the principle, as that judgment must be read in the light of the case which he was considering, namely, one of initial failure or lapse, where the trust in favour of the named object never came into operation; and it was, accordingly, necessary if the fund were to be administered *cy-près* that a paramount general charitable intent should be established. We were also pressed with *In re Stanford* (4), but in my opinion that case may also be consistent with the authorities which I have cited if the bequest made for the purpose of completing and publishing the testator's dictionary be construed as a gift of so much only of the sum mentioned as should be necessary for the accomplishment of the named purpose, so that there was a resulting trust of surplus for the testator and those claiming under him.

Having regard to my opinion on the first point that the trust is not a charity in the legal sense of the term, the plaintiff's action must fail and the appeal must be dismissed.

BEST, L.J.: In this case the Attorney-General appeals against the decision of Wilson, J., dismissing the action which was brought for a declaration that the defendant receives as a trustee the rent charge of £70 per annum payable out of certain lands on the Forde estate in the county of Down devised by the codicil, dated the 16th day of April, 1931, to the will of Matthew Forde and is bound to apply the whole of the

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(1) 38 Ch. D. 213.
(2) [1904] 2 Ch. 767.
(3) [1913] 1 Ch. 314.
(4) [1924] 1 Ch. 73.

said rent charge or of the income arising from the redemption monies thereof for the purpose of the charitable trust created by the said codicil with consequent relief, and that it may be referred to Chambers to settle a scheme for the future management of the said charitable trust and, if necessary, for the application of the trust moneys *cy-près*.

It is unnecessary to set out the provisions of the codicil which are correctly summarized in the statement of claim, and the defence to this action substantially relied on is that the testator manifested no general charitable intention in respect of the said rent charge, and that the same in so far as it cannot be expended in each year in accordance with the terms of testators' codicil is not applicable to any charitable purpose but results to and enures for the benefit of the persons entitled to the rents and profits of the townland from which the rent charge issues.

The learned Judge having carefully considered the matter came to the conclusion that the testator had not manifested any general or over-riding charitable intention and that when and so far as the particular objects fail, the balance of the rent charge remains undisposed of and merges in the inheritance, and he accordingly dismissed the action. He added that though the testator calls this trust a charity it is not, in his judgment, a charity in the legal sense.

There was no plea in the defence that the trust is not a charity but by common consent the question was argued before us and, of course, a decision on the point adverse to the learned Attorney-General puts an end to the action.

The relief of widows is not among the objects mentioned in the preambles to the Statutes of 43 Elizabeth, c. 4 and 10 Car. I., Sess. 3, c. 1, the Statutes dealing with charities, and the learned Attorney-General was driven to contend that a gift to widows may be a good charity because the law will supply the element of poverty by prefixing the word "poor" to widows, and he relies upon the *Attorney-General v. Comber* (1), where the gift was "to the widows and

(1) 2 Sim. & St. 93.

orphans of the parish of Z" but as was pointed out by Porter, M.R., in *In re Cullimore's Trusts* (1), at p. 20, parishes have certain duties towards the poor in England which they have not here and poverty was implied from the terms of the gift, and it is to be noted that widows are joined with orphans who *are* mentioned in the preambles already referred to. *The Attorney-General v. Comber* (2) was followed in *Thompson v. Corby* (3), which is also relied on by the Attorney-General. Here a bequest made "to twenty aged widows and spinsters of the Parish of P" was held to be a good charitable bequest. The Master of the Rolls, Sir John Romilly, says that "if the matter had depended on the statute alone, I should have thought that the word 'aged' would have been sufficient to create a good charitable bequest; but the case of *Attorney General v. Coombe* (2) determines that a bequest to the widows and orphans of a parish necessarily implies that it is for such as are suffering from destitution or privation."

In *In re Dudgeon, Truman v. Pope* (4), Stirling, J., held that a gift of the income of a fund to be paid "amongst respectable single women of good character above the age of sixty years to be paid by monthly instalments but so that no recipient shall receive more than £10 per annum" was a good charitable bequest and he points out that it is not absolutely necessary to find poverty expressed in so many words but that the whole gift must be looked at and if the Court should come to the conclusion that the relief of poverty was intended, it will give effect to the gift although the word "poverty" is not to be found in it.

Applying this test to the gift in the present case, I am unable to come necessarily to the conclusion that the persons whom the testator intended to benefit were to be poor widows, and as Wilson, J., in his judgment says, there is nothing in the gift confining the owners of the estate to the selection of *poor* qualified widows, and they may select any qualified widow no matter how well off she may be.

(1) 27 L.R.I. 18.
(2) 2 Sim. & St. 93.
(3) 27 Beav. 649.
(4) 74 L.T. (N.S.) 613.

I think it unnecessary to pursue the matter further as I agree in the conclusion of Wilson, J., and for the reasons stated by him, that the trust created by the codicil is not a charity in the legal sense.

Having arrived at this result, and this being the ground of my decision, I refrain from expressing any opinion on the other very interesting questions which were debated by the learned Attorney-General, but as the defendant has succeeded on a point which was not pleaded I think we should hear Counsel before deciding what the Order of the Court should be as regards costs.

Solicitor for the plaintiff: *Hume Babington.*

Solicitor for the defendant: *H. C. Weir.*

Solicitors for the trustee for the rent charge: *Wilson and Simms.*

J. McC.

IN RE JOHN FULTON AND COMPANY, LIMITED (1)

(1930. No. 6.)

Ch.D.
1931.

Jan. 21, 22, 28, 29.
Feb. 3, 4, 5, 23.

Company—Winding up—Misfeasance—Directors and auditor—Duties—Giving improper guarantees—Paying dividends out of capital—Failure to prepare proper balance sheets—Failure on part of auditor to audit and report on balance sheets—Wilful act or default—Directors' and auditors' liability—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69) *ss.* 26, 113.

In the winding up of the F. Company, under order of the Court, an investigation of its affairs disclosed :—

(*a*) that its liabilities included a large sum due on foot of guarantees given in respect of the debts of the C. Company, in which the F. Company owned all the shares, some of which guarantees had been given when the C. Company was insolvent.

(*b*) that in several years in the course of which the F. Company incurred losses, substantial sums were withdrawn from the amount standing to the credit of the reserve fund and utilised for the purpose of paying the dividends on the preference shares of the Company, the holders of which were not entitled under the Articles of Association to attend the general meetings of the Company so long as such dividends were paid.

(*c*) that a large sum, spent by the F. Company on advertising, was not charged against profits but that the amount so expended was carried forward as an asset in the accounts of the Company.

(*d*) that the auditor of the F. Company, who also acted as its accountant and registrar, prepared the Company's balance sheets, but these did not contain a report as required by Section 113, sub-s. 3 of the Companies (Consolidation) Act, 1908, nor was report made to the shareholders as required by sub-s. 2 of this section. Summarized balance sheets were, however, sent by the auditor to the Registrar of Companies and these bore the words " Audited Henry Jenkinson."

On a misfeasance summons under section 215 of the Companies (Consolidation) Act, 1908, the official liquidator sought to make the respondent directors and the auditor liable to make good the sums paid as dividends on the preference shares as aforesaid, and also the amount payable on foot of the guarantees and other accommodation given to the C. Company. The grounds upon which this relief was claimed were that the preference dividends had been paid out of capital and that the liability in respect of the guarantees had been

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(1) In the Chancery Division before Wilson, J.

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incurred on the basis that the balance sheets of the Company were accurate statements of the financial position, while the same were, to the knowledge of the directors and the auditor, false and misleading.

The Articles of Association of the F. Company provided that neither directors nor auditor should be liable for any loss or damage unless the same should happen through his own wilful act or default Two of the directors impugned stated that they left the finances of the Company entirely in the hands of the third director and the auditor.

Held, that the failure to have proper balance sheets prepared, and the giving of guarantees and other accommodation to the C. Company, and the payment of the preference dividends as aforesaid were wilful acts or defaults on the part of all the directors and that they were accordingly liable to make good the amount payable on foot of the guarantees and other accommodation given to the C. Company, and also to replace the amounts paid as preference dividends.

And *Held*, that the failure to audit and report on the balance sheets of the Company, and the sending of summaries purporting to be audited to the Registrar of Companies, were wilful acts or defaults on the part of the auditor, and that he was also liable to make good certain sums paid as preference dividends as a result of such default.

Misfeasance Summons.

John Fulton and Company, Limited (hereinafter sometimes referred to as "the Fulton Company") was incorporated in the year 1898 under the Companies Acts, 1862 to 1893. The objects of the Company were to acquire, and take over as a going concern, the business of one, John Fulton, and to carry on the business of shirt and woollen manufacturers, wholesale drapers, etc.

The original capital was £80,000 divided into 8,000 5½ per cent. cumulative preference shares of £5 each (which were offered for public subscription) and 8,000 ordinary shares of £5 each. This was subsequently increased to 10,400 ordinary shares of £5 each and 15,000 preference shares of £5 each, making a total issued capital of £127,000.

It was provided by Article 66 of the Articles of Association that "so long as the preference share-"holders receive their full preference dividend not "later than 1st February, and 1st August, in each "year, the preference shares shall not confer on the "holders thereof the right to notice of, or to attend "at general meetings of the ordinary shareholders "or at any other meetings, unless a proposition is to "be submitted which directly affects their rights or "privileges, nor shall they be entitled to inspect the "books or accounts of the Company, or any copy or "extract therefrom."

From the year 1910 onwards the directors of the Company were George H. Fulton, David Fulton and John Fulton. Henry Jenkinson, chartered accountant, the auditor of the Company had been appointed on 16th October, 1905, on the terms that he should do all the private work himself and that the half-yearly audit should be completed not later than 7th February and 7th August in each half-year. He was afterwards re-elected annually and remained auditor until the liquidation.

In the year 1902 the Fulton Company purchased the assets of a firm known as the Caledon Woollen Mills which were, on 4th June, 1910, sold to the Caledon Woollen Mills Company, Limited (hereinafter referred to as "the Caledon Company).

The Fulton Company owned all the shares of the Caledon Company and the said George H. Fulton, David Fulton and John Fulton were also the directors and Henry Jenkinson the auditor of the latter Company.

From the year 1920 onwards the Caledon Company made serious losses, and subsequently the Fulton Company, having power to guarantee the contracts of any company engaged in business similar to its own, gave the following guarantees to the Ulster Bank, Limited, in respect of the Caledon Company's overdraft:—

3rd February, 1925, guarantee £30,000, overdraft £35,000.

31st March, 1927, guarantee £35,000, overdraft £36,748.

29th September, 1928, guarantee £45,000, overdraft £45,958.

At the time when the first of these guarantees was given the solvency of the Caledon Company was doubtful, and at the dates upon which the second and third guarantees were given, its balance sheets showed that it was insolvent.

Between the years 1926 and 1930 the Fulton Company accepted accommodation bills on behalf of the Caledon Company, guaranteed by indorsement, bills issued by the latter Company and advanced to it a sum of £5,000 in cash, so that at the date of the liquidation the total accommodation amounted to £59,949, *viz.*, £45,000 in respect of guarantees, £5,600 in respect of accommodation bills, £4,349 in respect of bills endorsed, and the £5,000 loan, all of which, save 2/– in the £ had to be met out of the Fulton Company's assets to the loss of the preference shareholders.

Notwithstanding the fact that the Fulton Company made losses in the years 1926-27, 1927-28 and 1928-29, substantial sums were withdrawn from the amount standing to the credit of its reserve fund and utilised for the purpose of paying the preference dividends.

During the years 1925 to 1929 the Fulton Company expended sums, amounting in all to £13,846 in advertising. This expenditure was not charged against profits but the entire sum was carried forward as a good asset in the balance sheet and included in the debts due by sundry debtors.

Henry Jenkinson, as well as being auditor, acted as general accountant and registrar of both Companies. He prepared summarized balance sheets, purporting to be in compliance with section 26 sub-ss. 3 and 4 of the Companies (Consolidation) Act, 1908, at the foot of which were the words "Audited Henry Jenkinson," but the balance sheets of the Company contained no report as required by section 113 sub-s. 3 of the Act, nor was any report ever made to the shareholders as required by sub-s. 2 of this section.

The Fulton Company became unable to meet its liabilities and, by order of the Court, dated 28th February, 1930, it was ordered that it should be wound up under the provisions of the Companies Acts. A similar order was made in respect of the Caledon Company on 26th March, 1930.

Mr. Arthur Henry Muir, the official liquidator, sought in the present proceedings, to have the three directors and the auditor declared liable to make good and contribute to the assets of the Company, by way of compensation in respect of misfeasance or breach of trust, the following sums :—

(*a*) £10,312 10*s*. 0*d*., paid as half-yearly dividends on the preference shares of the Company during the years 1927, 1928 and 1929.

(*b*) £45,000, or such sum as might be found payable in respect of the guarantee dated 29th September, 1928, to the Ulster Bank, Limited, on behalf of the Caledon Company.

(*c*) £5,000 lent on 7th October, 1927, to the Caledon Company.

(*d*) £5,600, or such sum as might be found payable in respect of the liability on foot of the accommodation bills accepted by the Fulton Company on behalf of the Caledon Company.

(*e*) £4,349, or such sum as might be found payable in respect of the endorsement by the Fulton Company of bills accepted by the Caledon Company.

The grounds of the application as set forth in the summons were :—" that the sum of £10,312 10*s*. 0*d*. so " paid as aforesaid in dividends, was paid out of the " capital and not out of the income of the Company " and as regards the respective sums of £45,000, £5,000, " £5,600 and £4,349, that the liability for these sums " was incurred on the basis that certain balance sheets " of the Fulton and Caledon Companies, dated from " 1926 to 1929, were true and accurate statements of " the financial position of the said Companies, which " balance sheets within the knowledge of the directors " and the auditor were false and misleading."

David Fulton and John Fulton stated that they attended to the manufacturing end of the Company's business and left the finances in the hands of George H. Fulton and Henry Jenkinson. They further stated that they were not shown any balance sheets of the Company until towards the end of the year 1929.

Henry Jenkinson contended that the Fulton and Caledon Companies were private companies and that it was accordingly unnecessary that the list and summary mentioned in section 26 of the Companies (Consolidation) Act, 1908, should be sent to the Registrar of Companies. He stated that he never had a balance sheet of either Company and did not at any time attach an auditor's report to such balance sheets, and further that everything that he did in connection with the Companies was done under the direction of George H. Fulton.

It was provided by Article 164 of the Articles of Association of the Fulton Company that the directors and auditor should not be liable for each other's neglects and defaults, or for any other loss or damage whatever which might happen in the execution of the duties of their respective offices unless the same should happen through his own wilful act or default.

Megaw, K.C., and *McCoy* for the official liquidator.

Warnock for the preference shareholders and the creditors of the Company.

Black, K.C., for the directors.

Porter for the auditor.

Cur. adv. vult.

WILSON, J.

WILSON, J. : This is an application by the liquidator in the winding up of this Company for an order that the three directors of the Company, *viz.* : George H. Fulton, David Fulton and John Fulton, and Henry Jenkinson, trading as Henry Jenkinson and Company, auditor and registrar of the Company may be declared liable to make good and contribute to the assets of the Company by way of compensation in respect of misfeasance or breach of trust, five sums. [His Lordship read the particulars of the sums as set out in the summons.]

It is now my duty under section 215 of the Companies (Consolidation) Act, 1908, to examine into the conduct of these directors and the auditor and see if they, or any of them, have misapplied, or become accountable for any money or property of the Company, or been guilty of any misfeasance or breach of trust in relation to the Company, and if so, to compel such of them as are found at fault to restore the money or property so applied, with interest, or to contribute such sum to the assets of the Company, by way of compensaton in respect of the misapplication, retainer, misfeasance or breach of trust, as the Court thinks just.

It is necessary shortly to state the history of these two Companies, and ascertain the facts in relation to the alleged misapplication, misfeasance or breach of trust alleged against these four men. The business of the Fulton Company was started in 1864 by the late Mr. John Fulton. He sold his business to John Fulton & Company, Limited, in the year 1898. The original capital of the Company was £80,000, divided into 8,000 5½ per cent. preference shares of £5 each and 8,000 ordinary shares of £5. The 8,000 cumulative preference shares were offered for public subscription at par under a prospectus, dated 26th July, 1898. The business was sold to the Limited Company by John Fulton, senior, for £40,000, which included £14,320 1*s.* 0*d.* for goodwill. The purchase money was paid by the issue of 7,876 ordinary shares of £5 each and the balance in cash or preference shares. The purchase of the business was the first object of the Fulton Company, stated in the Memorandum of Association. The subscribers to the Memorandum of Association were John Fulton, his three sons, the impugned directors, William Fulton, another son, William McBretney, and S. A. Moore, and they took in all 124 ordinary shares. On September 7, 1908, the authorized capital of the Company was increased by £80,000 to £160,000, the increase divided into 12,000 5½ per cent. cumulative preference shares and 4,000 ordinary shares of £5 each. Seven thousand 5½ per cent. cumulative preference shares of £5 each were issued, making the total capital then issued £115,000, being £40,000 in ordinary shares and £75,000 in preference shares. In September, 1917, 2,400 ordinary shares of £5 each were issued, making the issued capital 10,400 ordinary shares of £5 each and 15,000 5½ per cent. cumulative preference shares of £5 each, or a total issued capital of £127,000, at which figure it continued till the date of liquidation.

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The first four directors were John Fulton (Chairman), George H. Fulton, David Fulton and William McBretney. On 16th October, 1905, the board was increased to five by the addition of John Fulton, junior. On 10th September, 1906, William McBretney retired and the business of the Company was carried on by the remaining four directors. In 1910 John Fulton, the father, died and the remaining three directors carried on the business of the Company till the liquidation. These are three of the parties sought to be made liable on the present application.

On the 16th October, 1905, Henry Jenkinson, carrying on business as Henry Jenkinson & Company, chartered accountants, the fourth person sought to be made liable herein, was appointed auditor of the Fulton Company on the terms (1) "that he does all the private work himself" (2) "that the half-yearly audit be completed not later than 7th August and 7th February in each half-year." He was re-elected annually afterwards and remained auditor of the Company till liquidation. He was also the registrar of the Company and auditor of the Caledon Company (which was a private company) from its incorporation till it went into liquidation. The ordinary shares of the Fulton Company were always held by members of the Fulton family, and at the date of liquidation and since before 1925, were held as follows:—

George H. Fulton and David Fulton	2,600	=	£13,000
William Fulton	780	=	3,900
John Fulton	2,340	=	11,700
George H. Fulton	2,340	=	11,700
David Fulton	2,340	=	11,700
	10,400		£52,000

Under the Articles of Association of the Company it was provided that "so long as the preference "shareholders receive their full preference dividend "not later than 1st February and 1st August in each "year, the preference shares shall not confer on the "holders thereof the right to notice of or to attend at

" general meetings of the ordinary shareholders, or at " any other meetings, unless a proposition is to be " submitted which directly affects their rights or " privileges, nor shall they be entitled to inspect the " books or accounts of the Company or to any copy " or extract therefrom."

In addition, the Company were entitled to have, and had deposited with them at interest large sums of money, amounting at the date of liquidation to £21,511, and the only protection the preference shareholders and those depositors, amounting in all to £96,511 (practically all invested by the customers of the Company and other members of the public) had, was the protection given them by section 26 of the Companies (Consolidation) Act, 1908.

Before the War the Company was prosperous. During the War and up to June, 1920, the nett profits, after paying excess profits duty, were £135,616. The nett losses in the year ending June, 1921, were £64,402. From June, 1921, to June, 1929, the results varied, and the total profits, as shown by the books, were £22,569, and the total losses were £17,876, or a nett profit for eight years of £4,693.

It took £4,125 per annum to pay the preference dividend, and £33,000 was paid in those eight years in respect of preference dividends, and in addition £3,225 was paid in respect of ordinary dividends, making in all £36,225 paid in those years, out of £4,693, actual profit made, and out of any other fund or property that could be made available therefor.

That the directors were aware of the serious position of the Company's finances was shown by the table made out by the liquidator in paragraph 6 of his affidavit which shows that the three directors impugned herein paid no dividend to themselves in respect of the £35,100 ordinary shares capital held in their own right, after June, 1922, till liquidation in January, 1930

This is further shown by the fact that from 1921 up to December, 1924, George H. Fulton, David Fulton and John Fulton were paid £1,000 and upwards a year for salaries as directors, and these salaries were voluntarily reduced to £200 a year from June, 1924, till the liquidation. John Fulton was further paid £800 a year from June, 1921, till June, 1924; £525 for the year 1925, and £200 for the year 1926 as director of the Caledon Company, and nothing from June, 1926, till liquidation.

It was also proved that the stock books were signed each year by the respective heads of the Company's departments, and were taken "at cost price or market value" and not "at cost price or market value, whichever is the lower." In consequence the stock was overvalued, and at the date of liquidation a considerable quantity of stock, which was old and depreciated, was included in the latest stock books at cost price. It was suggested that this was done deliberately on the instructions of George H. Fulton, but no legal evidence of that was given before me.

In addition, from December, 1925, to the year ending June, 1929, considerable sums were spent on advertising, amounting in all to £13,846 8*s.* 0*d.* None of this expenditure was charged against profits, but the whole sum was carried forward, in the ordinary balance sheet prepared, as a good asset. Also, depreciation of plant and machinery was not properly provided for and the balance sheet value of both plant and machinery was thereby improperly inflated.

Next, as to the Caledon Company. In the year 1902 the Fulton Company bought the assets of the Caledon Woollen Mills for £9,030 13*s.* 11*d.*, and it became the woollen manufacturing department of the Company, and on 4th August, 1910, the Company sold the Caledon Woollen Mills to the Caledon Woollen Mills Company, Limited, as from 4th June, 1910. The Caledon Company was incorporated on 4th August, 1910, to purchase and carry on the business of the Caledon Woollen Mills and the other businesses mentioned in its Memorandum of Association. The sale price was £54,150 which was paid by allotting 5,000 £1 shares, the whole capital to the Company's nominees and the balance by cross cheques, whereby the Company became unsecured creditors of the Caledon Company for £49,150.

In addition the Company was credited with £3,567 13*s.* 10*d.*, being the amount expended by them from 4th June, 1910, to 4th August, 1910. On 3rd December, 1910, the Company were creditors of the Caledon Company for £46,769 10*s*. 8d. The sale of the Caledon Woollen Mills resulted in the book profit of £11,349 12*s*. 10*d*., made up of £5,000 charged for goodwill, and increased value of machinery and plant £6,349 12*s*. 10*d*. The book profit was realised during the war boom, when the Caledon Company repaid to the Fulton Company all the money due on the sale. This book profit was capitalised by the Company in 1917, when they issued to the ordinary shareholders 2,400 ordinary shares of £5 each fully paid.

The directors of the Caledon Company since the death of John Fulton, senior, in 1915, were George H. Fulton (Chairman), David Fulton and John Fulton, and Henry Jenkinson was the auditor from the incorporation of the Caledon Company to its liquidation.

The Company owned all the shares of the Caledon Company, which was not prospering, and in 1915 the Company wrote off £5,000 of the Caledon Company's debt, but that was cancelled in June, 1918, when the Caledon Company was making large profits. The Company's loan was to bear interest at 5½ per cent., but no interest was charged against the Caledon profit and loss account till 1916, but by June, 1917, the entire interest to date was paid up.

On 5th December, 1915, £48,712 7*s*. 1*d*. was due to the Company, and by 4th December, 1920, the Caledon Company repaid all this and also their indebtedness to the Ulster Bank. During the war boom, from 1916 to 1920, the Caledon Company made £97,842, less excess profits duty of £45,245 11*s*. 2*d*., or £52,596 8*s*. 10*d*. nett profit. Then the slump came, and the Caledon Company made losses every year. From December, 1920, to the end of 1929, losses amounting to £62,403 were made, less £12,142 excess profit duty refunded, or £50,261 nett loss. The balance sheet of 30th November, 1929, showed a debit in the profit and loss account of £3,641 8*s*. 9*d*., which almost wiped out the small capital of £5,000. The balance sheet of November, 1926, showed the capital entirely lost, and the balance sheet of 1929 showed the Caledon Company entirely insolvent.

As the Caledon Company's affairs became worse, the Ulster Bank asked the Fulton Company for a guarantee of the Caledon Company's overdraft, and the Company gave the following guarantees against the overdraft, as follows :—

3rd February, 1925, guarantee £30,000, overdraft £35,000.
31st March, 1927, guarantee £35,000, overdraft £36,748.
29th September, 1928, guarantee £45,000, overdraft £45,958.

On 3rd February, 1925, the Caledon Company's balance sheet of 29th November, 1924, showed assets £49,015, liabilities £42,522 and capital £5,000, a surplus of assets over liabilities of £1,493. As the assets included £5,000 for goodwill it was almost certain that the paper surplus did not in fact exist. The Fulton Company's balance sheet at 31st December, 1924, only showed a surplus of £29,868. On 31st March, 1927, when the second guarantee was given, the Caledon balance sheet of 30th November, 1926, showed assets £36,900 (including £5,000 for goodwill) against liabilities of £38,866, and capital £5,000, and the Caledon Company were, excluding the capital of £5,000, insolvent, even on paper, to the extent of £1,966. The Fulton Company showed a surplus on paper of £21,533 in their balance sheet at 31st December, 1926.

It was clear that the action of the Fulton directors in increasing the Bank guarantee by £5,000 prejudiced the interests of their preference shareholders, the amount of their guarantee which was certain to be called on being much larger than the amount of their paper surplus. Further, on 7th January, 1926, the Company accepted accommodation bills on behalf of the Caledon Company for £3,900, and continued to accept further bills for the Caledon Company till 15th February, 1929, at which date the amount due was £5,600, and since 1928 these bill transactions were not recorded in the Company's books. In addition, on

7th October, 1927, the Company lent the Caledon Company £5,000, without security, by handing over to the Caledon Company £5,000 received by the Company from a depositor on that day.

On 29th September, 1928, the Company gave the Ulster Bank, Limited, a guarantee of the Caledon overdraft for £45,000, being an increase of £10,000 on the previous guarantee. The Caledon Company's balance sheet of 31st May, 1928, showed assets (including goodwill £5,000) value £40,789, and liabilities £53,014, making a deficiency (apart from the £5,000 capital) of £12,225. The Company's own balance sheet of 30th June, 1928, showed only a paper balance of £16,974 which obviously still further prejudicially affected the preference shareholders. The accommodation given by the Company to the Caledon Company at 29th September, 1928, was £53,000, *viz.*, £45,000 guarantee, £3,000 accommodation bills and £5,000 loan.

From the middle of 1928 onwards, the Company guaranteed, by indorsement, bills issued by the Caledon Company, and though no accurate account of these transactions was kept in the Company's books, at January, 1930, the date of the liquidation of the Fulton Company, the value of the bills so endorsed and not matured was £3,349, bringing at the date of liquidation the accommodation given to the Caledon Company by the Fulton Company to the sum of £59,949, *viz.*, guarantee £45,000, accommodation bills £5,600, loan £5,000 and bills indorsed £4,349, all of which sum save 2/- in the £, has now to be met out of the Fulton Company's assets to the loss of the preference shareholders.

The remaining matter which has to be investigated is the amount standing to the general reserve fund. In the year 1920 there stood in the books of the Company a sum of £90,000 to credit of this account. In September, 1921, a sum of £60,000 was withdrawn from this fund to meet the slump in stock values, and the following sums were withdrawn from it subsequently: September, 1925, £3,000; September, 1926, £3,000; September, 1927, £2,500; September, 1928, £6,500 and September, 1929, £8,000, making a total of £23,000.

These were withdrawn by resolution passed at the general meetings of the Company to meet the preference dividends paid on 1st February and 1st August, prior to such meetings, and as far as the paper accounts go, showing that such dividends were paid in those years, either wholly or partly out of past undivided profits. That this general reserve fund had long since been wiped away by losses is to me quite clear. The paper accounts show that from 1925 to June, 1929, there was a considerable loss in trading every year, rising from £814 18*s.* 9*d.* at June, 1926, to £4,526 11*s.* 5*d.* at June, 1929. If, as everyone knew, or ought to have known, the assets included £5,000 in capital, and £5,000 loan to the Caledon Company, £10,000 off the goodwill and £10,000 to £13,000 money spent for advertising, making in all £30,000 to £33,000, the balance standing in these accounts to credit of general reserve fund, varying from £27,000 in June, 1926, to £15,000 in June, 1929, would be entirely wiped out. Such in my judgment is the result of the examination of these accounts as appearing in the books and accounts of these two Companies, and without taking any account of the contingent liabilities incurred by the Fulton Company on behalf of the Caledon Company, and which during these years from June, 1927, to June, 1929, varied from £30,000 to £52,000. During all these years these contingent liabilities were actual liabilities as soon as the Ulster Bank chose to call for payment.

Turning from these interesting paper accounts to the realities of the situation, Article 118 (15) of the Articles of Association gives the directors power, before recommending any dividend, to set aside out of the profits of the Company, such sum as they may think proper as a reserve fund to meet contingencies or for equalising dividends, or for repairing or maintaining any property of the Company, or for such other purposes as the directors shall in their absolute discretion think good for the interests of the Company, and to invest such sums upon such investments other than shares of the Company as they think fit, and to buy such investments, etc., and with full power to employ the assets constituting the reserve fund in the business of the Company, and that without being bound to keep the same separate from the other assets. The reserve fund does not seem to have all been created out of profits of the Company, but whatever was its source it was never separately invested, but thrown into the business and mixed with the other assets of the Company. This fund, or any part of it, was not available for the payment of dividends till the directors resolved to so apply it.

The preference dividends paid in the years 1926-7, 1927-8 and 1928-9 were all paid when there was a loss of profits and before any such resolution was passed by the directors. In September of each of these years resolutions were passed withdrawing sums from the general fund sufficient to make it appear that there were profits available to pay these dividends. Articles 125 to 128 relate to the payment of dividends which must be paid solely out of profits but the directors have power from time to time to pay such interim dividend as in their judgment the position of the Company justifies. In my judgment these Articles could not justify the directors paying the dividends to the preference shareholders during those years, as having regard to what they knew or must be taken to have known of the state of the Company no honest judgment could have been formed by any of the directors that the position of this Company justified the payment of these dividends out of any profits past or present of the Company, and the Articles in any case only applied to interim dividends and not to the final dividends paid each year.

It remains to state that under Article 164 the directors and the auditor of the Company are not liable for each other's neglects or defaults, or for any other loss or damage whatever which shall happen in the execution of the duties of their respective offices or in relation thereto, unless the same shall happen through his own wilful act or default. The question for decision, therefore, is, are these directors and auditor, or any of them, liable for any misfeasance or breach of trust in relation to the several items mentioned, by which the Company has suffered any loss, and was such misfeasance or breach of duty due to the wilful act or default of the directors or any of them or of the auditor? The defences of the three directors are that Mr. George H. Fulton is in a nursing home, and not well enough to say anything for himself and the other two directors say that they respectively attended—David Fulton to the manufacturing end of the business in Ormeau Avenue and John Fulton to the manufacturing end of the business in Caledon, County Tyrone, and they both left the financial business of the Company to their brother, George H. Fulton, the financial director, and the auditor, Henry Jenkinson. No balance sheet was ever submitted at the annual meetings of the Company. Only an account in the form of a director's report, signed by Mr. George H. Fulton, was submitted. That Jenkinson attended all these meetings, and the business at these meetings was carried out according to his instructions and that the statements in the form of balance sheets sent to the Registrar of Companies, were not shown to them, and they were not aware of their contents. That the slump in 1921 took away three-fourths of the profits of the previous four and a half good years; that they are not responsible for this; that the directors did not accept any dividends after September, 1922, on their ordinary shares, but small dividends were paid to the other ordinary shareholders till September, 1925. They deny that their stocks were overvalued and they deny that any instructions were given by them, or to their knowledge, by Mr. George H. Fulton to any of the Company's employees to take stocks on a wrong basis. I find that there is no evidence of any intentional overvaluation of stock by any of the directors as the only evidence thereof is hearsay, and any evidence to that effect to be gathered from Mr. Jenkinson's own evidence, on which I refuse to act. At the same time whether intentionally or not some of the stocks were overvalued and should not have been valued at cost price as mentioned in Mr. Muir's affidavit. They justify the money spent in advertising and say they believed they were justified in treating this, not merely as a valid expenditure, but as a capital asset in the nature of goodwill to be written off out of future profits. They seem to have known all about it and took above view of the matter. They also justify the values of machinery and plant appearing in the balance sheet and justify not having written off more for depreciation. They say they saw no balance sheet of the Company till towards the end of the year 1929 and did not know how the shares of the Caledon Company were treated in them, and apparently that they should get credit for the difference between the balance sheet value of the Company's premises of £28,012 4*s.* 7*d.* and the price realised for the Howard Street premises at the liquidation, *viz.*, £35,000, and the one apparently should be set off against the other. They attempt to justify their commitments to the Caledon Company by saying it made large profits till 1920, and then made large losses, but they thought it could be put on a profitable basis. They admit they carefully considered the situation and came to the conclusion that the losses were partly due to mismanagement, and appointed a new manager in January, 1928. They tried to make it again profitable as it was an advantage to the Fulton Company. They say they did this in the best interest of the Fulton Company, but admit they may have been guilty of an error of judgment in regard to it. Their efforts, they admit, were unsuccessful but they say a decision had been taken to wind it up before they decided to wind up the Fulton Company. This decision is evidently an afterthought and no trace of it is to be found in the directors' minutes of the Caledon Company's meetings, the only place such a decision of the Caledon Company could arise or appear. It was because the Caledon Company was of great assistance to the Fulton Company that they gave the guarantee to the Ulster Bank and also assisted the Caledon Company by accepting and endorsing their bills. They also allege that the Memorandum of Association gave them power to guarantee the contracts or otherwise assist any Company engaged in any business the Fulton Company was authorized to carry on ; that the Caledon Company was such a business, and they were therefore authorized to give the guarantee and accept and endorse the bills for the Caledon Company; that they did this honestly and bona fide and to the best of their judgment and ability in the interests of the Fulton Company. They said they discharged their duties as directors of the Fulton Company honestly and faithfully and to the best of their judgment and ability; that they have sacrificed themselves in the interests of the Company, and lost all their means. They complain that their salaries during the years 1927-1928 and 1929 were so small, *viz.*, £200 a year each, that they were insufficient to pay their living expenses and that Mr. George H. Fulton had to overdraw his account to the extent of £2,192 12*s.* 0*d.*, which he now owes to the Company and Mr. David Fulton had to overdraw his account to the extent of £240 5*s.* 6*d.*, which he also now owes to the Company. In the result they seem to think that they are far more to be pitied than blamed. They have no further answer. This defence amounts to a contradictory combination of ignorance and prudent wisdom. Now, whatever I may conclude about their other defences, I should point out that there is no charge of converting any of the moneys of the Company to their own use brought against any of these directors on the present application, but these moneys drawn by George H. Fulton and David Fulton from the Companies' coffers at a time when it is alleged that they knew, or ought to have known, that the Company was so insolvent that the ordinary share capital was all lost, is the only foundation there could be of dishonesty against these directors. I would point out that it may be honest for directors to overdraw their accounts with their own Company so long as the Company has the security of their shares against any sums so overdrawn, with interest, but where the shares have no value to take money from the Company for their private expenses is simply applying the assets of the Company which should go to keep down the Company's overdraft with the Bank, and the Bank's interest thereon, seems to me little short of embezzlement, and excites no sympathy in me for these directors whatsoever. It means taking the money of the creditors and preference shareholders and spending it on themselves. The auditor, Henry Jenkinson, says he feels innocent of all misfeasance or breach of trust and that everything he did was quite right and no fault can be found with his conduct. That he prepared all the accounts and directors' reports and that he has read and actually quoted to me many passages from the law books showing that there was no law against writing up the assets of the Company and keeping premises at cost price when they had depreciated in value, or hiding the £13,000 odd, spent on advertisement as a good asset under the item " sundry account " in the original balance sheet, and condensing it in the summary balance sheet sent to the Registrar of Companies under the title " Sundry Debtors " ; that the same is true about another £1,000 odd spent on furniture, paper and twine, office fixtures and packages, and included under the same headings and claimed as a good asset. Future profits would, if the Company continued long enough, pay for the lot and they all tended to increase such profits and were properly entered as assets and should not be put into the balance sheet as expenditure. That this was a private Company and it was at least doubtful whether the list and summary provided by section 26 of the Companies (Consolidation) Act, 1908, should be sent to the Registrar of Companies at all ; that the preference dividends were all paid out of income, and so long as the balance sheet showed a reserve fund sufficient to pay them, over and above the loss on trading for that year, they were properly paid, and that this was the case down to the last balance sheet at June, 1929 ; that he never had a balance sheet of either of the Companies signed by two directors and never attached an auditor's report to such balance sheet, or had any reference to such a report attached to the balance sheet, nor was such report ever read before the Company in general meeting, and no such balance sheet or any balance sheet was ever issued, circulated or published with or without an auditor's report, so there was no breach of duty under section 113 of the Act. He further stated that anything he did wrong he did under the personal direction of Mr. George H.

Fulton and he was only an employee and had to obey orders.

Now the great difference between a business owned by an individual and a business conducted by a limited company is that the only money invested in a private business is the money of the owner, but the money invested in a limited company which is not a private company is money invested in shares of the Company by members of the public. The Fulton Company was not a private Company (Section 121 of the Companies (Consolidation) Act, 1908). It had invited the public twice to subscribe for preference shares in the Company, once in 1898, for £40,000, and again in 1908, for £35,000, and the public had subscribed this £75,000. In these circumstances the protection given to the public is given by the Act of 1908 under, *inter alia*, sections 26, 113 and 215. The auditor acted as general accountant and financial adviser and registrar as well as auditor for both Companies, and knew all about the accounts and liabilities. He prepared the summarized balance sheets purporting to be in compliance with section 26 sub-ss. 3 and 4, and at foot thereof signed the words "Audited Henry Jenkinson." He caused this to be forwarded to the Registrar of Companies under section 26 sub-s. 4, and thereby represented to the Registrar and to the public that the balance sheet referred to in section 113, stating that a balance sheet existed, signed by two of the directors, and duly audited by the auditor with his report that he had obtained all information and explanations required, and that in his opinion the balance sheet referred to in the auditor's report was properly drawn up so as to exhibit a true and correct view of the state of the Company's affairs, according to the best of the auditor's information and the explanations given to him and as shown by the books of the Company. This was a false representation to the knowledge of the auditor, Henry Jenkinson, and his attempt to get out of this by stating that the word "audited" to which he signed his name only meant "examined" is simply ridiculous. Whatever other penalties these annual false representations may expose the auditor to, I do not think they can make him liable in this application, for none of the loss complained of was caused by these falsehoods. It might have lulled the creditors and preference shareholders and the Ulster Bank to sleep but it did not cause the directors to give the accommodation or loan to the Caledon Company or the guarantee to the Ulster Bank for the Caledon Company, or to pay any of the preference dividends complained of, as such dividends were each year already paid before the false document was forwarded to the Registrar of Companies. Nor do I think that the auditor or anything he did or left undone caused the directors to give this accommodation or the loan to the Caledon Company or the guarantees to the Ulster Bank. The directors, and not the auditor, did these things, and they, if any one, are alone liable in respect of them. The only question left as regards the auditor is the payment of the preference dividends. To establish this liability the duties and responsibilities of both the directors and the auditors must be clearly ascertained. A director is at least an agent of the company to conduct and manage the business of the limited company, subject to the provisions of the Companies Acts, within the provisions of the Memorandum of Association, and according to the powers given him by the Articles of Association. The Companies (Consolidation) Act, 1908, the Memorandum, and Articles of Association all presume honesty on the part of both directors and auditors and assume that the directors will use at least the ordinary care and skill a man would use in the conduct of his own affairs. Can such a director escape liability, if he accepts such an agency, by saying that he was entirely ignorant of his duties and that he only saw the reports submitted at the annual general meetings, and left all the financial matters of the Company in the hands of George H. Fulton, whom they looked on as the financial director, and the auditor, whom they relied on to keep everything right. In my judgment he cannot accept such an agency and be paid for his work as such agent and be allowed in a court of justice to say that he knew nothing about the provisions of sections 28 and 113 of the Companies (Consolidation) Act, 1908, and also the provisions of the Memorandum and Articles of Association of the Company. He must, in a court of justice, be assumed to know that the annual list of members and other particulars mentioned in section 28, including a statement in the form of a balance sheet audited by the Company's auditor, and containing a summary of its share capital, its liabilities, its assets, giving such particulars as will disclose the general nature of those liabilities and assets, and how the value of the fixed assets have been arrived at, shall once in each year be prepared and that a copy must be forwarded to the Registrar of Companies each year. He must also be presumed to know that "the balance sheet audited by the company's auditor" is the balance sheet signed by two of the directors of the company and handed to the auditor to be audited, and that the auditor must make a report to the shareholders on the balance sheet and accounts examined by him, and on every balance sheet laid before the Company in general meeting which shall state (1) that he has obtained all the explanations and information he has required, and (2) whether in his opinion the balance sheet, referred to in the report, is properly drawn up, so as to exhibit a true and correct view of the Company's affairs, according to the best of his information and the explanations given to him, and as shown by the books of the Company. The balance sheet must be signed on behalf of the board of directors, and the auditor's report must be attached to the balance sheet, or there shall be inserted at the foot of the balance sheet, a reference to the report, and the report must be read before the Company in general meeting and shall be open to inspection by any shareholders. A penalty of £50 is imposed for issuing, circulating or publishing any copy of a balance sheet which has not been so signed, or any copy of a balance sheet without having a copy of the auditor's report attached, or containing a proper reference to such report, on any director or officer of the company who is knowingly a party to such default. In the Fulton Company the proper carrying out of these provisions was the only safeguard the preference shareholders and depositors and creditors had, as the Articles of Association deprived them of all other protection. Now the provisions of these sections were never carried out by the directors or the auditors. The balance sheets were not prepared by the directors and were never brought before any general meeting of the directors. Balance sheets were prepared by Henry Jenkinson but contained no report. No report was ever made to the shareholders as required by section 113 sub-s. 2, and consequently the list and summary sent to the Registrar of Companies, and stated to be "audited by the auditor," was false, and no summary as required by law was ever sent to the Registrar of Companies by the Fulton Company. Surely that was misfeasance and breach of duty. Was the non-preparation of a balance sheet by the directors, and the non-auditing and reporting on such balance sheet and the accounts of the Company a wilful act or default on the part of the directors and auditor? In my judgment it was. In law they knew it was necessary and in fact they did not do it, or make any attempt to do it. Instead they allowed a false summary, purporting to show it was done, to be forwarded to the Registrar of Companies. It remains to ascertain if the payment of these sums or any of them was due to such wilful act or default. If the balance sheets up to 31st December, 1926, had been properly audited by the auditor and brought before the general meeting on 7th September, 1926, would he not, if honest, have reported that the £88,406 6s. 11½*d.* was partly composed of expenditure for advertisements and other items which had not been charged to profit and loss; that the investments included £5,000 invested in the share capital of the Caledon Company which had been run at a loss for many years, and that in addition there was a contingent liability due, on foot of a guarantee for £30,000, in respect of the Caledon Company's overdraft of £35,220, which would have to be paid by the Fulton Company at any time the Bank chose to demand it, and that there was no prospect of getting any of these sums paid by the Caledon Company and, therefore, that the reserve fund stated to be £24,000 was really non-existent? Can anyone doubt that if such a report had been made the directors would have paused before they paid the preference dividends on 1st February, 1927, and 1st August, 1927, in the following year ? Similarly if an honest report had been made by the auditor on the balance sheet and accounts made up by him for the year ending 30th June, 1927, could they have dared to pay the preference dividends paid on 1st February, 1928, and 1st August, 1928, the subsequent year, when they were aware that an additional £5,000 had been advanced to the Caledon Company on 7th October, 1927 ? Again, if a similar honest report had been made by the auditor on the balance sheet prepared by him up to June, 1928, and had stated that the contingent liability was now £30,000 on the guarantee, £4,177 8*s.* 1*d.* on bills discounted for the Caledon Company, and £5,000 more for the loan of £5,000 to the Caledon Company, it is impossible to imagine that the directors would have had the audacity to pay the preference dividends paid by them on 1st February and 1st August, 1929. I am, therefore, clearly of opinion that the wilful act and default of the auditor, Henry Jenkinson, was one of the joint causes why the preference dividends paid in the years 1927, 1928 and 1929 were wrongly paid by the directors to the preference shareholders, and that he is liable to pay the sums so paid to the Company by way of compensation. As, however, the liquidator is of opinion that there is some doubt as to whether the sums paid in the year ending June 1927, might not properly be paid by way of preference dividend, I only order Henry Jenkinson to repay the dividends to the preference shareholders which were paid in the years 1928 and 1929 amounting to £8,248 0*s.* 0*d.*, and he must also pay the costs of this application so far as same have been incurred by the ascertainment of this liability.

I am also of opinion that the three directors are clearly liable to recoup the Company by way of compensation for the dividends actually paid to the preference shareholders in the years 1928 and 1929. If they had not wilfully neglected their duties as directors, and failed to have proper balance sheets prepared and audited and reported on by the Company's auditor, and brought with such report before the general meetings of the Company, these dividends could never have been paid and were in fact and law paid by the directors entirely regardless of whether they were paid out of capital or profits. When one turns from the accounts, balance sheets, books, etc., to the banking account of this Company, one finds that they had in reality only one banking account into which all the liquid assets of the Company were paid, and to which all receipts were lodged. Shortly before the preference dividends for the years 1928 and 1929 were paid, a sum sufficient to pay each half-yearly dividend was withdrawn and lodged to another account called the preference dividend account, and these dividends were paid out of that account accordingly. In fact in these years 1928 and 1929 by means of an overdraft, or in other words the overdraft of the Company, was on each of these four occasions increased by the amount necessary to pay these half-yearly dividends. *Prima facie*, therefore, these dividends were in fact paid by money borrowed from the Bank, and no sum was in fact pretended to be drawn from the general reserve till the subsequent general meeting of the Company held in following September of each of these years. In reality there was no such general reserve fund in these years. It only existed on paper if the contingent liabilities which were only postponed by the Bank being misled by false balance sheets which they assumed had been properly audited and reported on. They are also to compensate the Company in respect of all sums which may ultimately have to be paid in respect of the guarantee of £45,000 in respect of the Caledon Company's overdraft and of the bills accepted and indorsed. At the time these guarantees were given and these bills were accepted and indorsed it was quite clear, or should have been quite clear but for the reckless carelessness of the directors, that these moneys could never be met by the Caledon Company, and it is not true in any way that these liabilities were or could have been incurred in the interests of the Fulton Company, and the same holds true of the loan of £5,000 to the Caledon Company in October, 1927. I hold as a fact on the evidence that the loan of £5,000 was given and all these contingent liabilities were incurred by the directors, not in the interest of the Fulton Company at all, but solely to put off the evil day when both Companies would have to go into liquidation, and were given and incurred entirely regardless of the interests of the Fulton Company and solely to bolster up the Caledon Company which the directors knew was hopelessly insolvent. If demonstration were necessary it is shown by what occurred when the Bank pressed for security and asked for the title deeds of the Howard Street premises to be lodged with them as security for the Fulton Company's liabilities to them. This was refused and the resolutions for voluntary liquidation were passed of necessity and at once. I accordingly order that these directors must recoup to the Company the sum of £5,000 in respect of the loan to the Caledon Company of October, 1927, and whatever sums the Company have eventually to pay in respect of the contingent liabilities on foot of the guarantees to the Bank and on the bills accepted and indorsed by the Fulton Company on behalf of the Caledon Company, and the directors must also pay the costs of this application, save so far as same has been increased by the application to make the auditor liable, and I will refer all these costs to the Taxing Master to tax and segregate accordingly.

Solicitor for the official liquidator : *Thomas McKinty.*

Solicitors for the preference shareholders and preference shareholders : *Wheeler & McCutcheon.*

Solicitor for the directors : *Robert Wallace.*

Solicitors for the auditor : *J. A. Leighton & Son.*

J. D. C.

C.A.
1931.

June 30.

IN RE SAMUEL WIGHTMAN, DECEASED.

WIGHTMAN v. COUSINS AND SKILLEN (1).

Practice—Will—Construction—Trusts of will already administered —Costs—R.S.C. 1905, *Order* 54A. *and Order* 55 *r.* 4.

The testator had bequeathed his farm to his wife and daughter for their respective lives with remainder to his grandson, W.J.W., on condition that he should reside on the farm and assist in the management thereof until he attained the age of 20 years, with a gift over to testator's son, W.W., in the event of this condition not being fulfilled.

In the year 1928, W.J.W. attained the age of 21 years, whereupon the surviving trustee of the will gave him possession of the farm, the wife and daughter having previously died.

On the death of W.J.W. in the year 1930, W.W. brought a summons for the construction of the will. It was contended on his behalf that W.J.W. was not entitled to the farm, under the terms of the will, by reason of the fact that he had failed to comply with the conditions of the bequest. The plaintiff sought to have this matter decided by the Court either under Order 54A, or under Order 55, rule 4.

Held, by the Court of Appeal (affirming the judgment of Wilson, J. [1931] N.I. 138) that the trustee having administered the deceased's estate, and allowed W.J.W. into possession of the farm, the question in issue was not a proper one to be determined on originating summons under Order 55, rule 4, as a question arising in the administration of the trusts of the deceased's will.

And *Held*, that Wilson, J., in refusing to determine the matter under Order 55A. (as a question arising upon the construction of the will) had exercised the discretion given to him by rule 4 of that Order, upon proper grounds, and that his judgment on that point should also be affirmed.

APPEAL, from an order of Wilson, J., whereby he refused to determine, on originating summons, a question arising under the will of Samuel Wightman, on the ground that the estate had already been administered and that the question was accordingly not a proper one to be determined under Order 55 rule 4; and that in exercise of the discretion given by rule 4 of Order 54A, it was not a proper case in which to determine a question raised as to the construction of the will, on originating summons under that Order.

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(1) In the Court of Appeal before Andrews and Best, L.JJ., and Brown, J.

The proceedings before Wilson, J., are reported at [1931] N.I. 138, where the facts are fully stated.

The plaintiff appealed to the Court of Appeal.

Murphy, K.C., and *McSparran* for the appellant.

All parties were willing that the learned Judge should decide the question raised by the summons as a matter arising on the administration of the deceased's estate and there is no reason why he should not have done so under Order 55, rule 4. It has been held that this rule should be given a wide and liberal construction. *Harrowby (Earl of) v. Leicester Corporation* (1).

Again the Judge was asked to determine the matter, under Order 55A, rule 1, as a question arising on the construction of the will, and such determination should not have been refused.

McGongial, K.C., and *Johnson* for the respondent, Jane Skillen:

Proceedings under Order 55, rule 4, are only appropriate to cases in which, prior to that rule, an action for full administration would have lain. *In re Medland: Eland v. Medland* (2).

A decision on the construction of the will, in the present case, whichever way the question might be decided, would not necessarily put an end to the litigation, and consequently, Wilson, J., was right in refusing to decide the matter on originating summons. *Lewis v. Green* (3). Moreover under Order 55A the Judge is given an absolute discretion, as to whether he shall determine the matter or not, and this discretion was properly exercised.

Ellison for the respondent, Robert Cousins.

(1) 85 L.J. (Ch.) 150.

(2) 41 Ch.D. 476.

(3) [1905] 2 Ch. 340.

ANDREWS, L.J.: This matter comes before us on appeal from an order made by Wilson, J., on the hearing of an originating summons.

The summons was brought by William Wightman seeking to have the will of Samuel Wightman deceased construed. Wilson, J., refused to do this on the ground that the question raised was not, in the circumstances, a proper question to be determined on originating summons.

It is necessary for us to express our views on the subject of jurisdiction. Order 55, rule 4, enables any person claiming to be interested as legatee of a deceased person to take out a summons in Chambers for the determination, without an administration of the estate, of any question arising in the administration of the estate.

Mr. McGonigal contends that the application of this provision is confined to cases, which prior to the rule, could only be determined in a full administration action.

I agree with this contention. The object of the rule is, in my opinion, to enable questions to be determined, which really arise in the administration of an estate, without a full administration. This view is clearly expressed in the judgment of Cotton, L.J., in *In re Medland: Eland v. Medland* (1); and in *In re King; Mellor v. South Australian Land Mortgage and Agency Company* (2), Neville, J., points out that the jurisdiction of the Court has not been enlarged by the making of the rules under which a simpler form of procedure is now possible than was formerly in vogue.

The first question to be determined in the present case, therefore, is whether there was a case for administration of the estate. We are of opinion that there was not. Samuel Wightman, the testator, died seventeen years ago, and his daughter and his widow died in 1919 and 1923, respectively. His grandson, William John, came of age in 1928, and the latter's right to the possession of the farm which was handed over to him was never disputed by any one until after his death in

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(1) 41 Ch.D. 476 at p. 488.

(2) [1907] 1 Ch. 72 at p. 75.

1930. The estate of the testator has been long since fully administered, and no action for its administration would now lie. Accordingly, Order 55, rule 4, in our opinion, does not apply.

We must next consider Order 54A, rule 1, which was also strongly relied upon by plaintiff's Counsel. This rule enables any person claiming to be interested, under a deed or will or other written instrument, to apply, by originating summons, for the determination of any question of construction arising under the instrument and for a declaration of the rights of the persons interested. This rule is of greater scope and confers wider powers upon the judge ; and under it Wilson, J., could, undoubtedly, have made an order if he had so desired : but in the exercise of the discretion conferred upon him by rule 4 of the same order, he refused to entertain the application, being of opinion that the question ought not to be determined on originating summons.

If we were of opinion that no sufficient reason had been assigned by Wilson, J., for refusing to hear the summons, or that he had acted upon any erroneous principle, we should have heard it and proceeded to determine the questions asked, but we consider that he had ample grounds for the course which he took.

He considered that in the circumstances, and especially having regard to the fact that the estate has already been administered, the plaintiff's proper remedy, it any, would be by ejectment proceedings, and with this I entirely agree. Even if the opinion of the Court were obtained upon originating summons, this might not obviate the necessity, ultimately, of a common law action in ejectment, in which conflicting testimony might be given as to compliance with the conditions of the devise to William John Wightman.

A strong appeal was made to us on behalf of the plaintiff that, even though unsuccessful, he should be allowed his costs. With regard to this question of costs, I would direct the attention of the parties to *In re Buckton : Buckton v. Buckton* (1), in which Kekewich, J., divides originating summonses for the purpose of costs into three classes, the third of which he characterises as an application made by a beneficiary who makes a claim adverse to other beneficiaries and really takes advantage of the convenient procedure, by originating summons, to get a question determined which, but for this procedure, would be the subject of an action commenced by writ, and would strictly fall within the description of litigation. In such a case, where, as Kekewich, J., says, the Court is asked to determine rights between adverse litigants, the rule applicable to adverse litigation ought to apply, and the unsuccessful party should pay the costs of all whom he has brought before the Court. *In re Buckton : Buckton v. Buckton* (1) was followed in *In re Halston : Ewen v. Halston* (2), and in *In re Fletcher : King v. King* (3).

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(1) [1907] 2 Ch. 406.

In my opinion the principle is a sound one. The Court ought not to make an order in what is really adverse litigation which would result in the successful party being directed to pay the costs of the unsuccessful party. The present case clearly falls within the principle.

Wilson, J.'s, order will, accordingly, be affirmed with costs.

BEST, L.J. : I agree.

BROWN, J. : I agree.

Solicitor for the appellant : *James F. Fitzpatrick.*

Solicitor for the respondent, Jane Skillen ; *James Irwine.*

Solicitor for the respondent, Robert Cousins : *A. J. Lewis.*

J. D. C.

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(1) [1907] 2 Ch. 406.
(2) [1912] 1 Ch. 435.
(3) 62 S.J. 740 ; [1918] W.N. 278.

C.A.
1931.

Feb. 17, 19.
March 11.

DUNN v. SHANKS.

(1929. No. 2303.)

Estoppel—Transfer of business—No change in name of Firm—No Notice of Transfer—Business carried on in apparently the same manner and by the same persons.

The plaintiff sued the defendant for £278 2*s.* 7*d.*, the price of goods sold and delivered.

For several years the plaintiff had sold to the defendant tailoring materials. The defendant carried on a tailoring business, trading as T. S. & Son. The defendant by deed in 1925 assigned the premises in which he was carrying on his business to E. S. and G. S., who continued to trade as tailors under the name of T. S. & Son. No assignment in writing was made of the business or of the debts due to the defendant, and no notice of the assignment of the premises or of any change in the ownership of the business was given to plaintiff. Defendant came to the place of business after the transfer and appeared to act in relation to the business in the same way as he had done before the transfer took place.

The action was tried before Moore, L.C.J., and a special jury. The jury found (*a*) that the plaintiff supplied the goods and paid the monies sued for in the belief that there was no change in the business after 1925, (*b*) that the defendant did not intend the plaintiffs so to believe, but that his presence on the premises led them to believe so (*c*) that in all the circumstances it was reasonable for the plaintiff so to believe and to act, (*d*) that there was a real change in the business transferring it from T. S. in 1925.

On the jury's findings the Trial Judge abstained from giving judgment for either party, and left the parties to move for judgment. Both the plaintiff and the defendant applied to the Court of Appeal for judgment, or alternatively, for a new trial.

Held, by the Court of Appeal (Andrews and Best, L.JJ.) that the defendant was estopped from denying that at the time the goods whose price was sued for were sold and delivered, he was not the owner of the business, and that the plaintiff was entitled to judgment.

MOTION for judgment or a new trial.

The action was brought by the plaintiff to recover the sum of £278 2*s.* 7*d.* for goods sold and delivered by plaintiff to defendant and for moneys paid by plaintiff for the use of defendant, at his request.

C.A. 1931.

DUNN v. SHANKS.

The action was tried before Moore, L.C.J., and a special jury of the City of Belfast, on 20th January, 1931.

The following statement of the facts is taken from the judgment of Andrews, L.J. :—

For many years prior to 1925 the defendant carried on business in Belfast as a merchant tailor under the name of "T. Shanks & Son." The plaintiff's business relations with the defendant opened in the year 1916, when the plaintiff's son, who had been managing his business for twenty years, made trade inquiries as to the firm, from other warehouses who were dealing with the defendant. The result of these inquiries was such that the plaintiff's son said that he knew that as long as Thomas Shanks (the defendant) was in the firm he was safe. It was to him that he said he gave credit, and he looked upon him as a man to whom credit could safely be given, a man who lived in good style in a private house in Holywood, and who owned property in Wellington Place, and he had heard also on the Malone Road, Belfast.

In February, 1925, the defendant sold his business (other than book debts) to his brother, Edward Shanks, and George Steed, both of whom had been in his employment for many years previously. There was some conflict as to the respective duties performed by these three men both prior and subsequent to the sale, but there was ample evidence before the jury that the management of the business after the sale continued much on the same lines as previously. Thomas Shanks, unless when prevented by illness, continued to act as cutter. The business stationery, the buying of goods, and the giving of cheques remained, according to plaintiff's son, the same as before. He declared that there was no visible change in the business, that he received no circular in reference to the sale of the business, and saw no notice in the Gazette or local papers. It was not until June, 1929 (when the account terminated) that he first learnt that the defendant had sold the business, and he stated positively that he continued to give credit after 1925 in the belief that the defendant was still the owner of the business.

The plaintiff's book-keeper from 1917 to 1930 also affirmed that he never knew of any change in the carrying on of the business after 1925; and that, whether before or after 1925, if he wanted cheques he went to Steed. He also said that he never saw any circular as to the change, nor did he ever hear of any change.

For the defence it was proved that a circular in reference to the change had been drafted by Mr. Norman Wilson, solicitor, but Steed, to whom was entrusted the duty of sending out the circulars, was unable to say if they had been posted. It was admitted by Edward Shanks that the defendant used to come often to the premises after 1925, almost daily; that he was there to give a stimulus to trade, to give customers encouragement to attend, and that it might be that travellers seeing him might think he was in charge still and give him credit accordingly. Steed admitted that when he told plaintiff's son in 1929 of the new partnership, he replied that it was the first he had heard of it; and another witness for the defence, John Clarke, who was employed with the defendant from 1923 till 1929, also said on cross-examination, that the defendant was there to give a stimulus to trade, and to persuade old customers that he was still in charge of the business.

The Lord Chief Justice left four questions to the jury. These questions with their answers were as follows:—

(*a*) Did the plaintiff supply the goods and pay the moneys sued for in the belief that there was no change in the business after February, 1925? Answer: Yes.

(*b*) Did the defendant intend the plaintiffs so to believe? Answer: No—but his presence on the premises led them to believe so.

(*c*) In all the circumstances was it reasonable for the plaintiff so to believe and to act on it? Answer: Yes.

(*d*) Was there in fact a real change in the business transferring it from T. Shanks in February, 1925? Answer: Yes.

On these findings the Trial Judge abstained from giving judgment for either party and left the respective parties to move for judgment.

McGonigal, K.C. (with him *Porter*) for the plaintiff :—

There was a duty cast on the defendant to bring home the fact that he was no longer a principal in the business, to those who had been previously doing business with him. We submit that on the jury's findings we are entitled to judgment.

We rely on the words used by Lord Denman, C.J., in his judgment in *Pickard v. Sears* (1), where he says: "But the rule of law is clear, that, where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter the existence of a certain state of things as existing at the same time." In *Cornish v. Abington* (2), it was held, that if any person by actual expressions or by a course of conduct, so conducts himself that another may reasonably infer the existence of an agreement or licence, and acts upon such inference, whether the former intends that he should do so or not, the party using that language, or who has so conducted himself, cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct. We rely upon the words used by the Lord Chancellor (Lord Cranworth) in *Jorden v. Money* (3). We also rely on the words used by Lord Blackburn in his judgment in *Miles v. McIlwraith* (4).

Lord Birkenhead, L.C., stated the law on the subject in the following terms in his speech in *Maclaine v. Gatty* (5), "the rule of estoppel or bar, as I have always understood it, is capable of extremely simple statement. Where A. has by his words or conduct justified B. in believing that a certain state of facts exists, and B. has acted upon such belief to his prejudice, A. is not permitted to affirm against B. that a different state of facts existed at the same time."

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(1) 6 A. & E. 469.
(2) 4 H. & N. 549.
(3) 5 H.L.C. 185, 213.
(4) 8 App. Cas. 120, 133.
(5) [1921] 1 A.C. 376, 386.

In *Carr v. London and North-Western Railway Co.* (1), Brett, J., in his judgment, said : " If a man by his words or conduct wilfully endeavours to cause another to believe in a certain state of things which the first knows to be false, and if the second believes in such state of things, and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not in fact exist."

The question of intention does not affect the case at all, and the findings of the jury are conclusive. The duty of the defendant was to bring home to old customers that the position had been changed. After 1925 the defendant continued to hold himself out to the plaintiff, by his conduct as the proprietor of the business. There was very powerful evidence to go to the jury that the plaintiff never received notice of the change in the ownership of the business. The effect of the evidence given by the plaintiff's son was to shift the onus of showing that the plaintiff had received notice on to defendant, who was unable to produce such evidence.

We submit that the plaintiff is entitled to judgment.

Murphy, K.C., and *Warnock* for the defendant :—

The goods were not in fact sold by the plaintiff to the defendant. The plaintiff cannot succeed unless the defendant is estopped from telling the truth. If estoppel breaks down, the case is over. The definition of estoppel given in *Coke on Littleton* is " when one is concluded and forbidden in law to speak against his own act or deed, yea, though it be to speak the truth."

In order to raise an estoppel there must be a representation of an existing fact. The representation which is alleged was that Thomas Shanks was sole proprietor both before and after 1925. The jury only found that the conduct of Thomas Shanks was consistent with continuous ownership. It was also, we submit, consistent with a number of other things.

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(1) L.R. 10 C.P. 307, 316.

In *Low v. Bouverie* (1), Kay, L.J., said that: "in order to create an estoppel, the statement by which the defendant is held bound must be clear and unambiguous." Precisely the same principle would apply to conduct as to a "statement." Ambiguity, if it exists, affords a complete defence. The conduct of Thomas Shanks, was equally consistent with more than one state of facts. We submit that in fact no representation was made at all. No acts of Thomas Shanks were proved which were not consistent with more than one state of facts. His conduct was equally consistent with a partnership. A cause of action cannot be founded on estoppel which is merely a rule of evidence. In *Low v. Bouverie* (2), Bowen, L.J., said: "Estoppel is only a rule of evidence; you cannot found an action upon estoppel." If an act is capable of two interpretations, then estoppel can never arise. If Thomas Shanks would not have been estopped from denying a partnership, then he is not estopped from denying a sale. Estoppel cannot arise from a representation, which is capable of being explained, as a representation of each of two different states of facts. Such a representation must be clear and unequivocal. No judge has ever suggested that the word "wilfully" used in *Pickard v. Sears* (3), should be left out. We rely on *Swan v. The North British Australasian Co.* (4), which has frequently been referred to with approval. It was stated by Cockburn, C.J., in *In re Bahia and San Francisco Railway Co.* (5), that before estoppel can take place, the representation must be made with the intention that it shall be acted upon. In *Cornish v. Abington* (6), Pollock, C.B., said: "In the present case the plaintiff had distinctly given notice that he understood that the defendant was dealing with him. The defendant gave no answer." The statement of Pollock, C.B., in *Cornish v. Abington* (6) cannot be severed from the state of facts with which he was dealing. We

(1) [1891] 3 Ch. 82, 113.
(2) [1891] 3 Ch. 82, 105.
(3) 6 A. & E. 469.
(4) 2 H. & C. 175.
(5) L.R. 3 Q.B. 584.
(6) 4 H. & N. 549, 556.

submit that *Cornish v. Abington* (1) must be read as merely one of a series of authorities.

McGonigal, K.C. (in reply):—

It was not the duty of the plaintiff every time he took an order to inquire who was the owner of the business. It is enough if the plaintiff really believed that defendant meant him to act upon the representation. (*Freeman v. Cooke* (2)). The defendant is an old man, but he was there to give a stimulus to trade. It was the defendant's duty to see that circulars regarding the change of business were sent out. The defendant should have brought home to the old customers the fact that he had disposed of the business.

Cur. adv. vult.

ANDREWS, L.J.

ANDREWS, L.J.: This case raises an interesting question on the law of estoppel. The plaintiff sued for £278 2*s*. 7*d*., balance of an account for goods sold and delivered and money paid between 9th March, 1927, and 11th June, 1929. For many years prior to 1925 the defendant carried on business in Belfast as a merchant tailor under the name of "T. Shanks & Son." The plaintiff's business relations with the defendant opened in the year 1916, when the plaintiff's son, who has been managing his business for twenty years, made trade enquiries as to the firm from other warehouses who were dealing with the defendant. The result of these enquiries was such that the plaintiff's son says that he knew that as long as Thomas Shanks (the defendant) was in the firm he was safe. It was to him that he says he gave credit, and he looked upon him as a man to whom credit could safely be given—a man who lived in good style in a private house in Holywood, and who owned property in Wellington Place, and, he had heard, also on the Malone Road, Belfast.

In the month of February, 1925, the defendant sold his business (other than book debts) to his brother Edward Shanks and one George Steed, both of whom had been in his employment for many years previously.

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(1) 4 H. & N. 549, 556. (2) 2 Ex. 654.

There is some conflict as to the respective duties performed by these three men both prior and subsequent to the sale; but there was ample evidence before the jury that the management of the business after the sale continued much on the same lines as previously. Thomas Shanks, unless when prevented by illness, continued to act as cutter. The business stationery, the buying of goods, and the giving of cheques remained, according to plaintiff's son, the same as before. He declared that there was no visible change in the business; that he received no circular in reference to the sale of the business, and saw no notice in the Gazette or local papers. It was not until June, 1929 (when the account terminated) that he first learnt that the defendant had sold the business; and he stated positively that he continued to give credit after 1925 in the belief that the defendant was still the owner of the business. The plaintiff's book-keeper from 1917 to 1930 also affirmed that he never knew of any change in the carrying on of the business after 1925; and that, whether before or after 1925, if he wanted cheques he went to Steed. He also said that he never saw any circular as to the change, nor did he ever hear of any change. For the defence it was proved that a circular in reference to the change had been drafted by Mr. Norman Wilson, solicitor; but this evidence broke down, as Steed, to whom was entrusted the duty of sending out the circulars, was unable to say if they had been posted. The Bank was, no doubt, informed of the change, but this was no notice to the plaintiff. Though the evidence for the defence differs in certain respects from that given on behalf of the plaintiff, it was admitted by Edward Shanks that the defendant used to come often to the premises after 1925—almost daily; that he was there to give a stimulus to trade, to give customers encouragement to attend; and that it might be that travellers seeing him might think he was in charge still and give him credit accordingly. Steed admitted that when he told plaintiff's son in 1929 of the new partnership, he replied that it was the first he had heard of it; and another witness for the defence, John Clarke, who was employed with the defendant from 1923 till 1929, also said on cross-examination that the defendant was there to give a stimulus to trade, and to persuade old customers he was still in charge of the business.

Without further examination of the evidence, I have no hesitation in saying that the jury were fully justified in answering the questions submitted to them by the Lord Chief Justice as follows:—

(*a*) Did the plaintiff supply the goods and pay the moneys sued for in the belief that there was no change in the business after February, 1925? Answer: Yes.

(*b*) Did the defendant intend the plaintiffs so to believe? Answer: No—but his presence on the premises led them to believe so.

(*c*) In all the circumstances was it reasonable for the plaintiff so to believe and to act on it? Answer: Yes.

(*d*) Was there in fact a real change in the business transferring it from T. Shanks in February, 1925? Answer: Yes.

On these findings the learned Judge abstained from giving judgment for either party and left the respective parties to move for such judgment as they might respectively be advised. Both have now moved this Court for judgment, or, alternatively, for a new trial.

In the able arguments addressed to us we had brought to our notice all the leading authorities from *Pickard v. Sears* (1) to the present time. In that case Lord Denman, C.J., enunciated the law of estoppel as follows:—"Where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." We have seen how Parke, B., whilst asserting that this rule cannot now be in question, interpreted the word "wilfully" in a manner which appears to make the motive or intention of the party who makes the representation a matter of little or no importance. Pollock, C.B., in *Cornish v. Abington* (1), also observes that the word "wilfully" in the rule means nothing more than "voluntarily." If the representation was made voluntarily, though the effect in the mind of the hearer was produced unintentionally, the same result would follow. In holding the defendant liable in that case the Chief Baron said that the ground of his opinion was that "the jury having "found that the defendant," *whether intentionally or not* (the italics are mine), "led the plaintiff to form an "opinion that he was dealing with the defendant and "induced him to furnish goods to the defendant, the "defendant must pay for them."

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(1) 6 A. & E. 469.

I do not propose, however, to proceed through all this long line of cases, in which the law of estoppel is to be found expressed by many Judges in language which varies more in form than in substance. Perhaps the tendency of judicial minds has been somewhat to relax the onus of proof which lies on the person who alleges the representation. I pass at once to the most recent authoritative decision—*Maclaine v. Gatty* (2). In his speech in the House of Lords, Lord Birkenhead, L.C., expressed himself as follows:—"The learned "counsel cited various authorities in which these "doctrines have been discussed, but the rule of "estoppel or bar, as I have always understood it, is "capable of extremely simple statement. Where A. "has by his words or conduct justified B. in believing "that a certain state of facts exists, and B. has acted "upon such belief to his prejudice, A. is not permitted "to affirm against B. that a different state of facts "existed at the same time. Whether one reads the "case of *Pickard v. Sears* (3) or the later classic "authorities which have illustrated this topic, one will "not, I think, greatly vary or extend this simple "definition of the doctrine."

This view of the principle of estoppel was not dissented from in any way by the other members of the Court, and Lord Dunedin expressly stated that he "concurred with all that had been said by the noble

(1) 4 H. & N. 549.
(2) [1921] 1 A.C. 376.
(3) 6 A. & E. 469.

ANDREWS, L.J.

"and learned Lord on the Woolsack." I conceive it to be our clear duty in the circumstances simply to apply the rule as so enunciated to the facts of the present case.

The conduct of the defendant which has been relied upon is that, whilst giving no notice of the change in the ownership of the business, he remained on in the premises working much as before. This naturally threw the plaintiff off his guard ; it stifled the enquiry which he would otherwise have made. As the jury found, his presence on the premises led the plaintiff to believe that there was no change in the business after 1925. This is the "conduct" which produced the "belief." But Lord Birkenhead's proposition goes further—the plaintiff must be justified in his belief. Here again the jury have found that it was reasonable for the plaintiff so to believe and to act on it. If it was reasonable for him so to do, he was clearly justified in so doing. If the evidence adduced on his behalf be accepted, as it apparently was by the jury, that he never knew of the change, and he never saw or heard any evidence of it, why should he not be justified in assuming that a state of affairs which he had in the first instance ascertained by enquiry to exist still continued to exist in fact just as it did in outward appearance. The last essential of Lord Birkenhead's proposition is that the plaintiff should have acted upon the belief to his prejudice. The prejudice is self-apparent ; and the fact that he acted upon it and that he reasonably did so is affirmed by the jury in their answer to the third question. It may be said that the loss will fall harshly upon the defendant, who has been acquitted by the jury of all wrongful intent ; but, if we assume both parties equally innocent, it seems to me that the loss falls properly on the one who knew the facts, and who could have taken but did not take, the necessary steps to prevent the loss arising.

I am further of opinion, whilst laying down no general proposition, that in the facts of the present case there was no misdirection on the part of the learned judge in telling the jury that after a course of

ANDREWS, L.J.

credit from 1916 to 1925 given by plaintiff, it lay on the defendant to acquaint plaintiff of any change.

The defendant further relies in his notice for a new trial on the alleged wrongful rejection of evidence tendered to prove notification to other customers of the sale of the business. I have not been satisfied by Mr. Warnock that this evidence was admissible against plaintiff, whose rights would be absolutely unaffected by notice to others which was withheld from him.

Finally, the defendant relies in his notice on the fact that "the plaintiff gave no evidence that he was unaware of the change of ownership of the business." His counsel explained that by this was meant that the plaintiff did not personally give such evidence, though admittedly it had been given on his behalf by his son, who had been managing the business for the plaintiff for twenty years and who stated that he largely had charge of this account. It was also so stated by his book-keeper. No requisition of this character was made at the trial which appears to me to have proceeded on the basis that in this matter the son was really the plaintiff's "alter ego." Whilst I agree that it would have been more satisfactory if some explanation had been given of the plaintiff's absence from the trial, it is in my opinion too late to contend that the plaintiff may have had some knowledge of the change in the business which he never imparted to his son or to his book-keeper, the persons who, on the evidence, had the real charge of the matter.

In my opinion the plaintiff is entitled to our judgment for £278 2*s.* 7*d.* with costs.

BEST, L.J.

BEST, L.J.: This matter comes before the Court on motion by the plaintiff and on cross motion by the defendant for judgment.

The action was brought to recover the sum of £278 2*s.* 7*d.* for goods sold and delivered and for money paid, etc., and the amount claimed is not in dispute.

It was tried before the Lord Chief Justice and a Special Jury who answered the questions submitted to them as hereinafter mentioned and the learned Judge refused to enter judgment for either party, leaving them to move as they might be advised.

The facts of the case which were admitted or proved in evidence may be stated very shortly. For some nine or ten years prior to 1925 plaintiff had from time to time sold to defendant cloth, trimmings, and other materials necessary for the business of a tailor which was being carried on by the defendant, trading as Thomas Shanks & Son, and it was owing to the credit and financial standing of the defendant that the transactions were entered upon and the goods were supplied. The defendant by deed in 1925 assigned the premises in which he was then carrying on his business to Edward Shanks and George Steed, who continued to trade as tailors under the name of T. Shanks & Son. No assignment in writing was made of the business or of the debts due to the defendant, and no notice of the assignment of the premises, or of any change in the ownership of the business, was given to plaintiff, nor was any intimation of such change given to defendant's creditors or at any rate no intimation was proved. Defendant came to the place of business after the transfer and appeared to act in relation to such business in the same way as he had done before the transfer took place. The goods whose price is sued for were supplied from March, 1927, and onwards until a few days before the issue of the writ, and plaintiff gave credit after 1925 in the belief that Thomas Shanks was still the owner of the business. It was only in June, 1929, when the payment of a cheque in favour of plaintiff drawn by T. Shanks & Son was stopped, that plaintiff learnt that Thomas Shanks had sold his business to Edward Shanks and George Steed.

The action was then begun by specially indorsed writ and the defence consisted of traverses. The reply, which was mere joinder of issue, was by leave amended and the amended reply set forth that the defendant is estopped from denying that the plaintiff sold and delivered the said goods to him, or that the plaintff paid the said moneys to or for the use of the defendant, or at his request, or that the defendant drew said cheques, or that they were duly presented for payment or dishonoured, and the grounds on which it was claimed that defendant was estopped were set forth in detail in such amended reply.

The sole point for determination is whether the defendant is so estopped, and if this be decided in plaintiff's favour he is entitled to judgment.

I think it unnecessary to go through or comment on the evidence, as, in my opinion, there is ample evidence to support each of the findings of the jury on the questions submitted to them.

Those questions with the answers are as follows:—

(*a*) Did the plaintiff supply the goods and pay the moneys sued for in the belief that there was no change in the business after February, 1925? Answer: Yes.

(*b*) Did the defendant intend the plaintiffs (*sic*) so to believe? Answer: No—but his presence on the premises led them to believe so.

(*c*) In all the circumstances, was it reasonable for the plaintiff so to believe and to act on it? Answer: Yes.

(*d*) Was there in fact a real change in the business transferring it from T. Shanks in February, 1925? Answer: Yes.

Upon these findings, as already stated, judgment was not entered for either party.

Many authorities ranging from *Pickard v. Sears*, (1) *Cornish v. Abington* (2), and *Freeman v. Cooke* (3) to *Ord v. Ord* (4) were cited in argument by one side or the other, but no good purpose would be served by an examination of them, or by an attempt to apply the principles enunciated in them to the facts of the present case.

There is, however, in one of the authorities cited to us a definition or statement of the rule of estoppel which will enable us to solve the question at issue. This is the case of *Maclaine v. Gatty* (5), in which a succinct and clear statement of the rule is given in the judgment of Lord Birkenhead, L.C., at p. 386.

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(1) 6 A. & E. 469.
(2) 4 H. & N. 549.
(3) 2 Ex. 654.
(4) [1923] 2 K.B. 439.
(5) [1921] 1 A.C. 376.

His Lordship is there reported as saying that: "The learned counsel cited various authorities in "which these doctrines have been discussed, but the "rule of estoppel or bar, as I have always understood "it, is capable of extremely simple statement. Where "A. has by his words or conduct justified B. in be-"lieving that a certain state of facts exists, and B. "has acted upon such belief to his prejudice, A. is not "permitted to affirm against B. that a different state "of facts existed at the same time."

Applying the rule to the present case we find every element in it satisfied. The defendant Thomas Shanks, by his conduct in attending the shop and allowing matters to go on after 1925 as they had done before, and by not informing plaintiff of the change in the ownership of the business, justified the plaintiff in believing in the existence of a certain state of facts, viz.: that defendant's ownership still continued, and the plaintiff having acted upon such belief to his prejudice, the defendant cannot now be permitted to affirm against the plaintiff that his ownership did not continue after 1925.

It appears to me that the rule can be applied directly to the facts as found by the jury.

Further, I am of opinion that it was the duty of the defendant, if he desired that plaintiff should not be led to believe in his continued ownership of the business, to inform the plaintiff of the change that had taken place, and that Mr. Murphy's objection to the charge of the Lord Chief Justice regarding this matter was not well founded.

The defendant must therefore be held estopped from denying that at the time the goods whose price is sued for were sold and delivered he was not the owner of the business, and judgment must be entered for the plaintiff for the sum of £278 2*s*. 7*d*., together with the costs of the action and of plaintiff's motion.

Solicitors for the plaintiff: *C. & H. Jefferson.*
Solicitor for the defendant: *J. C. Taylor.*

J. McC.

FINLAY v. PRICE (1).

C.A.
1931.

April 20, 21.
June 18.

(1930. No. 1937.)

Negligence—Contributory negligence—Evidence for jury—Effect of finding by jury that plaintiff took "an undue risk"—Weight of evidence—Motion for judgment—Functions of Judge and Jury.

Plaintiff stepped off the footpath and started to cross the street in front of oncoming traffic. A motor milk van just missed hitting her, but a motor cyclist, coming up behind the milk van and seeing the road clear to the right of the van, in attempting to pass the milk van, hit the plaintiff who had emerged in front of the van.

The Lord Chief Justice refused to direct for the defendant and the jury found that the defendant was guilty of negligence, that his negligence caused the accident, that the plaintiff was not guilty of negligence, but they believed she took an undue risk in relation to the motor van, and they assessed the damages at £745 3*s.* 0*d.*

The Lord Chief Justice gave judgment for the plaintiff for that amount.

The defendant appealed to the Court of Appeal on the ground that the findings of the jury that the defendant was guilty of negligence, that his negligence caused the accident, and that the plaintiff was not guilty of negligence, were made without evidence and against the weight of evidence; that there was no evidence proper to be submitted to the jury of negligence on the part of the defendant, and that the Lord Chief Justice should have granted the application for a direction made to him on behalf of the defendant and, alternatively, on the jury's finding that the plaintiff took an undue risk in relation to the motor van, the Lord Chief Justice should have entered judgment for the defendant.

Held, by Andrews, L.J. (*a*) that there was evidence of negligence on the part of the defendant proper to be submitted to the jury and that the Lord Chief Justice was right in refusing to direct in the defendant's favour; (*b*) that even assuming contributory negligence to have been admitted or proved, there was ample evidence upon which the jury might reasonably have found that the defendant could have avoided the consequences of that negligence; (*c*) that the jury's answer that the plaintiff took an undue risk in relation to the motor van did not amount to a finding of contributory negligence; and that the defendant's motion should be dismissed.

Held, by Best, L.J. (*a*) that there was no evidence proper to be submitted to the jury from which they ought to infer that the defendant was guilty of negligence, and that the Lord Chief Justice should have directed in his favour; (*b*) that the defendant was en-

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(1) In the Court of Appeal before Andrews and Best, L.JJ.

C.A.
1931.

FINLAY
v.
PRICE.

titled to judgment on the ground that if the jury found, as they should have found, plaintiff guilty of negligence, they should also have found that the defendant could not by reasonable care have avoided the consequences of the plaintiff's negligence, and that judgment should be entered for the defendant.

The Court of Appeal being equally divided, the judgment entered for the plaintiff by the Lord Chief Justice stood.

MOTION for judgment.

The action was brought by the plaintiff to recover damages for personal injuries caused by the alleged negligence of the defendant in the driving, control and management of a motor cycle.

The trial took place before Moore, L.C.J., and a special Jury of the City of Belfast.

The following summary of the facts is taken from the judgment of Best, L.J. :—

Just before the accident took place, the plaintiff was in the shop of one Thomas Gray and, having transacted her business she left the shop and proceeded to go in the direction of her own home which is in Sandown Road, Belfast. To reach Sandown Road, which comes into Upper Newtownards Road nearly opposite Gray's shop, it was necessary for plaintiff to cross the footpath in front of Gray's shop and Upper Newtownards Road, which at this point is over 36 feet wide. Upper Newtownards Road is one of the main thoroughfares in the east end of Belfast and the stream of traffic along it both outwards and inwards is very considerable. There are two tramway tracks in the road, the distance of the outside rail in each case being about eleven feet from the nearest kerb. Plaintiff, herself, was not examined at the trial nor was her evidence taken on commission. At the time when plaintiff was about to step off the path and cross the road a motor milk van was coming from Belfast, which was on plaintiff's right, and it was followed by defendant on his motor cycle. Plaintiff proceeded to cross the road. Thomas Gray stated that he watched her to the kerb on his own side, that he went to put money away, that he heard a crash, and he added that he saw her look up the road towards Dundonald (which was on plaintiff's left side) and then towards city. He looked through the window and saw plaintiff lying on the ground a couple of feet beyond the incoming tram line (which is the line farthest away from his shop), and someone drew his attention to blood which was a couple of feet beyond the ingoing tram line. He also stated that the motor cycle was on the ground near the middle of the opening of Sandown Road, that the machine was running and that it was fifteen yards from Mrs. Finlay. In a statement taken on 29th October, 1930, by a clerk to defendant's solicitors and signed by Gray, he had said that he did not watch her progress across the road, that his attention was first attracted by a crash, and that the motor cycle was lying on the road about five yards from where Mrs. Finlay was lying.

James Robson stated that at the time of the accident he was standing at the corner of Sandown Road looking towards the city (which would be to his left). He saw a light motor milk van coming from the city on the proper side of the road, its right wheel being between the two outgoing tram lines, and it was going between fifteen and twenty miles an hour. He saw it about Bethany Street (this would be about forty yards nearer Belfast than Gray's shop and on the same side of the road). The motor cycle was fifteen or twenty yards behind, and was catching up on the milk van. He noticed the plaintiff on the footpath at Gray's and she was on the kerb when the milk van was at Bowman's shop, which is about twenty-five yards from Gray's shop. He said he saw the lady looking "both roads," then she came over, the milk van tried to pass behind her and slowed up, if anything. He noticed defendant, who came out from behind the motor van and seemed to go between plaintiff and the kerb stone (this is the kerb on far side of road from Gray's) and he knocked her down, he accelerated when coming out from behind. Plaintiff was half-way between the kerb and inside line when struck, and the bonnet of the motor had passed her. He (that is the driver of the milk van) could not have seen the accident. He said he heard no horn sounded by defendant. In cross-examination, witness said that the plaintiff was walking "natural," she was walking quick, she seemed to be in a hurry, she looked both ways, she took a casual glance, she hurried across not close to the lorry, that the lorry was thirty yards away when the plaintiff left the kerb, that the cyclist was evidently intending to pass the lorry on his right side, that the cyclist was not on the incoming tram track but between the two lines of the outgoing track, when the lady left the kerb, at which time the cyclist was six or seven yards behind the lorry and that it was not drawing out from behind the lorry.

This witness had also made a statement to defendant's solicitors' clerk in which he said that he noticed the lady step off the footpath on the far side, she appeared to be in a hurry. He saw her give a casual glance and then hurry across the road, and when she had reached the centre of the two tram tracks the van would have been about fifteen yeards away and it had turned a little towards the footpath on its own side, that the motor cycle was close up to the van at this time, that the driver of the motor cycle would have been seventeen yards from witness when he cut out to pass the van and that the plaintiff at that time would have been twelve yards away from the cyclist, that when the cyclist saw the lady he swerved further out to the right in an effort to avoid her but he did not slacken speed, and that the cycle struck the woman knocking her down, that she fell six feet from the footpath, and that the cycle was lying five yards from where the woman was lying.

According to the evidence of the plaintiff's husband, who interviewed defendant after the accident and asked him how it happened, defendant said he came out from behind a motor lorry and it was impossible for Mrs. Finlay to have seen him coming, and that by two inches less he would have missed her. Asked did he sound the horn, the defendant said : " No, because if I had sounded it Mrs. Finlay would have stopped and I should have killed her." Defendant told this witness that he had done his best to avoid the accident.

For the defendant, Frank Kyle gave evidence that he was driving his father's motor van on the occasion and was coming from Belfast with empty milk cans, his brother Henry being seated in the back of the van.

He was approaching the place where the accident occurred at about fifteen miles per hour, he saw a lady starting from the left kerb to run across the road when about six or seven yards distant from him, and he did not see her look either way. She ran across the road and he applied both brakes and swerved to the left to avoid hitting her, and if the brakes had not been good he would surely have hit her. His right mudguard just missed her by three or four inches, he looked through a pane of glass at his side and saw her hit by the motor cycle which was then in the centre of the ingoing tram line. So far as he could see the cyclist could not have avoided the plaintiff. In cross-examination witness said that the plaintiff had one foot on the kerb when he saw her, that he stopped his van six or seven yards beyond where the plaintiff was standing on the kerb, and that she went almost double our speed. He further said that the defendant could not have cleared the lady by getting next the lorry as he would have risked his own life.

The defendant, who had had one accident previously in which no one was hurt, said that he had been following the van, which was about ten yards in front of him, up the road for about a quarter of a mile, that he knew Sandown Road, and before he came to it he had been waiting for an opportunity to pass the van, but was prevented from doing so by cityward traffic, that he waited until he could see a considerable distance up Sandown Road and when he found it clear, he pulled out to pass. He was then between the two tram tracks right in the centre of the road, and once he started to swing out he sounded his electric horn, the road ahead being then clear. He accelerated to a speed of twenty to twenty-two miles an hour and as his head drew level with the back wheel of the van he saw the head and shoulders of a woman (the plaintiff) appear above the front mudguard of the van. She was about one yard in front of the mudguard and only the van's length in front of himself. Plaintiff was hurrying and the defendant said that he could not hope to pull up in that length so he immediately swerved as violently as he could to the right. He almost avoided touching the plaintiff but his left foot-rest caught her and tripped her and owing to the swerve he fell to the ground, the road being wet at the time. On cross-examination, the defendant said he was from two and a half to three yards from the lady when he first saw her, that her husband's account of the conversation was correct and that he had not sounded his horn after seeing the plaintiff. In re-examination, he said, that it was only at the third interview that Finlay (plaintiff's husband) said he was to blame.

Harry Kyle corroborated his brother's evidence about the plaintiff stepping off the footpath and said that when the brakes of the milk van were applied he was thrown off his seat and some milk cans were turned over. In cross-examination, he said the lady ran and that the defendant had drawn out to pass at the time that he (Kyle) saw the lady.

At the close of the evidence the Attorney-General applied to the Lord Chief Justice to direct the jury to find a verdict for the defendant on the grounds :—

(*a*) that there was no evidence proper to be submitted to the jury on which they could find a verdict for the plaintiff ; and

(*b*) that a verdict found for the plaintiff would be against the evidence and the weight of evidence.

The Lord Chief Justice refused to direct.

The following were the questions left by the Lord Chief Justice to the jury, and the answers returned by them :—

(*a*) Was the defendant guilty of negligence ? Answer : Yes.

(*b*) Did it cause the accident ? Answer : Yes.

(*c*) Was the plaintiff guilty of negligence ? (By inadvertence the words "contributing to the accident" were omitted from the question.) Answer : No, but we believe plaintiff took an undue risk in relation to motor van.

(*d*) If the plaintiff was guilty of negligence, could the defendant by reasonable care have avoided it ? Not answered.

(*e*) Damages ? Answer : £700 plus doctor's fees. £745 3*s*. 0*d*.

After an absence of an hour the jury came into Court and asked in writing whether negligence in question (*c*) includes negligence relating to the motor lorry or only in relation to the motor cycle.

The jury having been requested to withdraw, Lowry, K.C., asked the Lord Chief Justice to tell them that negligence merely in respect of the lorry was not negligence in respect of the cycle, whilst the Attorney-General asked him to tell the jury that if the lady was negligent as regards the lorry, she must, on the evidence, have been negligent as regards the motor cycle. The Lord Chief Justice said, " Not so," as she could not have known that the cycle was there with the lorry between them, and he then proceeded to direct the jury as follows :—" You have put a very difficult question to me and I will try to answer it. You must consider whether the lady was negligent in regard to the motor cycle. That is one of the issues you will have to try, and it is suggested that you might find she was negligent in regard to the motor cycle if, immediately before she rushed out, she had been negligent in respect of the lorry, but it does not necessarily follow. You might draw the inference if you wish to distinguish between the two things, that there was nothing to prevent her seeing the motor lorry, but she had not any idea that the motor cycle was coming. It may be difficult for you to say she was negligent in regard to a vehicle she never saw."

The jury in a short time answered the questions as set out.

The Lord Chief Justice entered judgment for the plaintiff on the findings of the jury.

The Attorney-General (*Babington, K.C.*), *Murphy, K.C.* (with them *Porter*) in support of the motion.

Pedestrians ought to look out for traffic that may reasonably be expected to be on the road, although not seen. There is no evidence of negligence on the part of the following vehicle. The only evidence for plaintiff was that given by Gray and Robson. No evidence of negligence on the part of the defendant can be found in Robson's evidence or reasonably inferred from it. The motor cycle was entitled to pass in a legitimate manner.

Evidence was given that the plaintiff was sufficiently recovered to give evidence on commission. In her absence, we submit there was no evidence of negligence on the part of the defendant. At the close of the case the evidence for the defence remained unshaken.

It would have been much better if the Lord Chief Justice had left the questions to the jury in the usual form.

Even if the plaintiff did look up and down the road that does not absolve her from negligence. Looking up and down the road does not comprise the whole duty of a pedestrian in these circumstances. We submit that the duty of the plaintiff was not completed when she looked up and down the road, before leaving the kerb. The negligence of the plaintiff was completed when she elected to step off in front of the moving vehicle.

We ask for judgment, we do not ask for a new trial.

We submit that the jury were satisfied that the plaintiff was negligent in stepping off the kerbstone in front of the approaching motor milk van. We contend that taking an undue risk is negligence. There is no evidence to show that the plaintiff did not see the motor cycle, or did not know that it was on the road. It is immaterial whether the plaintiff did or did not sound his horn.

We rely on *Coyle v. Great Northern Railway Co. of Ireland* (1).

We submit that in the present case the plaintiff crossed at her own risk.

We contend that the Lord Chief Justice should have acceded to the requisition made on behalf of the defendant at the close of the evidence to withdraw the case from the jury.

If the plaintiff had been knocked down by the milk lorry the blame would not have been with the driver of the lorry. The defendant had no opportunity of seeing the plaintiff.

(1) 20 L.R.I. 409.

We submit that when the jury found that the plaintiff took an undue risk as regards the motor lorry, so much the more did she take such undue risk as regards the motor cycle. The jury in their anxiety to find a verdict for the plaintiff were doing their best to avoid answering questions (*c*) and (*d*).

We contend, however, that the answer of the jury that the plaintiff took an undue risk in relation to motor van, is a finding that the plaintiff was negligent. It is always dangerous to pass in front of a fast-moving vehicle, as there may be another passing vehicle.

We submit that the present case very much resembles *Hayden v. McQuillan* (1), but that it is a stronger case for the defendant.

We rely on *Swadling v. Cooper* (2) as an authority for the proposition that once this lady appeared in front of the motor lorry, nothing that the defendant had omitted to do could be imputed to him as negligence.

Even although no application was made for a direction at the close of the plaintiff's case, on the authority of *Banbury v. Bank of Montreal* (3), the Court can enter judgment for the defendant.

[They also referred to *Dublin, Wicklow and Wexford Railway Co. v. Slattery* (4), and *Radley v. London and North Western Railway Co.* (5).]

McGonigal, K.C., and *Lowry, K.C.* (with them *Chambers*) for the plaintiff :—

In *Metropolitan Railway Co. v. Wright* (6), it was held that a new trial ought not to be granted on the ground that the verdict of the jury was against the weight of the evidence, unless the verdict was one which a jury, viewing the whole of the evidence reasonably could not properly find.

In *Cox v. English, Scottish and Australian Bank, Ltd.* (7), it was held by the Privy Council that in discharging the verdict of a jury, the Court must be

(1) 63 I.L.T. 170.
(2) [1931] A.C. 1.
(3) [1918] A.C. 626.
(4) 3 App. Cas. 1155.
(5) 1 App. Cas. 754.
(6) 11 App. Cas. 152.
(7) [1905] A.C. 168.

satisfied that there is such a preponderance of evidence against it as to make it unreasonable and almost perverse that the jury, when instructed and properly assisted by the judge, should have returned it. The Court must not usurp the functions of the jury.

We submit that in effect the Lord Chief Justice approved of the verdict of the jury.

We submit that there was ample evidence on which the jury could have found that the defendant could have avoided the consequences of the plaintiff's negligence.

The evidence given that the defendant did not sound his horn is most material.

In the present case there was evidence far more powerful than that given in *Dublin, Wicklow and Wexford Railway Co. v. Slattery* (1).

We submit that the evidence of the defendant is not to be believed. The jury were entitled to take the view that the defendant took his chance of getting between the plaintiff and the kerb and did not bring it off.

We submit that this Court should not usurp the functions of the jury and enter judgment for the defendant. The jury did not find that the plaintiff was negligent. The defendant was conscious of the presence of the plaintiff on the road before she emerged past the milk lorry.

We submit that the defendant was negligent in the following respects :—(*a*) he should not have crossed to the wrong side of the road ; (*b*) he should have sounded his horn and waited until the milk lorry drew to the left, so as to leave room for him to pass, unless the driver of the milk lorry signalled to him to pass ; (*c*) having gone to the wrong side of the road when he saw the plaintiff he should have stopped or slowed up to allow her to cross the road ; (*d*) when he saw the plaintiff he should have sounded his horn, she could then have easily stopped between the motor lorry and the motor cycle ; (*e*) if when he saw the plaintiff he could not stop or slow down, it must have been because he accelerated when he came up from behind the motor

(1) 3 App. Cas. 1155.

lorry and was going too fast; (*f*) when he saw the defendant he was going too fast.

We rely on the words used by Palles, C.B., in his judgment in *Coyle v. Great Northern Railway Co.* (1). The facts in *Davey v. London and South Western Railway Co.* (2) are totally different from those existing in the present case. In *Radley v. London and North Western Railway Co.* (3) it was held that though a plaintiff may have been guilty of negligence, and although that negligence may, in fact have contributed to the accident which is the subject of the action, yet, if the defendant could, in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him. *Dublin, Wicklow and Wexford Railway Co. v. Slattery* (4) decided that where there is conflicting evidence on a question of fact, whatever may be the opinion of the Judge who tries the case as to the value of evidence, he must leave the consideration of it for the decision of the jury. The present case is very much like *Gaffney v. Dublin United Tramways Co., Ltd.* (5). How the defendant changed his position and got to the wrong side of the road is essentially a jury question.

A person who goes out of the stream of traffic takes a greater onus upon himself if an accident takes place than if he had remained in the stream. The jury were entitled to neglect the evidence of the defendant in its entirety.

We submit that the defendant's application should be refused.

[They also referred to *Hayden v. McQuillan* (6), *Swadling v. Cooper* (7).

The Attorney-General (*Babington, K.C.*) (in reply):—

The absence of evidence that the horn was sounded is neutral and immaterial. The jury found that the plaintiff took an undue risk in relation to the motor

(1) 20 L.R.I. 409, 418.
(2) 12 Q.B.D. 70.
(3) 1 App. Cas. 754.
(4) 3 App. Cas. 1155.
(5) [1916] 2 I.R. 472.
(6) 63 I.L.T.R. 170.
(7) [1931] A.C. 1.

van. We submit that this is a clear finding of negligence.

We rely on *Banbury v. Bank of Montreal* (1). We submit that it was the duty of the Lord Chief Justice to withdraw the case from the jury.

The plaintiff was not entitled to assume that no other vehicle would attempt to pass the motor lorry. The defendant had no duty imposed on him to blow his horn. The present case very much resembles *Hayden v. McQuillan* (2). The defendant could not stop, he could not turn to the left, the only thing that he could do was to swerve. He very nearly succeeded in clearing the plaintiff. There was no evidence on which the jury could reasonably find the verdict that they found.

We submit that the Lord Chief Justice should have withdrawn the case from the jury.

Cur. adv. vult.

ANDREWS, L.J.

ANDREWS, L.J. : This is a motion by the defendant for judgment. The action was tried before the Lord Chief Justice and a special jury of the city of Belfast. On the findings of the jury the Lord Chief Justice entered judgment for the plaintiff with costs in the sum of £745 3*s.* 0*d.* for "damages and doctor's fees."

The claim was the result of a street accident which took place on 16th May, 1930, when a motor cycle ridden by the defendant collided with and knocked down the plaintiff, who sustained serious injuries.

Before proceeding to a consideration of the evidence, it may not be out of place to summarize as briefly as possible the principles upon which the Courts act in determining whether or not a party against whom verdict and judgment have been entered is entitled to have that verdict set aside and either judgment entered in his favour or a new trial directed. I shall, of course, confine my observations to the principles applicable to a case of this character, in which a verdict is assailed on the ground that it is either unsupported by any evidence or that it is against the weight of evidence.

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(1) [1918] A.C. 626. (2) 63 I.L.T.R. 170.

The guiding rule of the court is that if there was no evidence to go to the jury, *i.e.*, not literally none, but no evidence upon which a jury could reasonably have found the verdict which they did, the party against whom such verdict was given is entitled to have that verdict set aside and judgment entered in his favour. To justify this course, however, the cases show that the evidence must be such as would have justified the judge at the trial in giving a direction, and withdrawing the case from the jury ; that is, it must be so clear that there is no room for any honest difference of opinion. The facts must be admitted or uncontradicted, and only one view of these facts must be reasonably possible —mere strength of proof or preponderance of evidence can never transfer the right of decision upon a question of fact from the jury to the judge. In a case of negligence such as the present case, if there is evidence from which negligence may be reasonably inferred the matter must be left to the jury to say if it ought to be inferred. On the other hand, if the court is of opinion that the verdict was merely against the weight of evidence, *i.e.*, one which, whilst supported by some evidence, was not such as, viewing the whole evidence reasonably, could properly have been found, a new trial should be directed. In interpreting this rule which was laid down in *Metropolitan Railway Co. v. Wright* (1), the Privy Council in *Cox v. English Scottish and Australian Bank, Ltd.* (2), adopted the view of Lord Selborne that in discharging the verdict of a jury the court must be satisfied that there is such a preponderance of evidence against it as to make it unreasonable, and almost perverse, that the jury, when instructed and assisted properly by the judge, should have returned it. Where, lastly, a question of fact is left to the jury and there is reasonable evidence to support their verdict, that verdict cannot be disturbed, even though the Court which reviews the facts might itself have arrived at a different finding. See judgment of Lord Atkinson in *Toronto Railway Co. v. King* (3). The duty of the Court to uphold the verdicts of juries

(1) 11 App. Cas. 152.
(2) [1905] A.C. 168.
(3) [1908] A.C. 260, 270.

supported by reasonable evidence has been repeatedly expressed by the highest judicial authority. Thus "when a litigant has obtained a judgment in a Court of "justice, he is by law entitled not to be deprived of "that judgment without very solid grounds." Per Lord Loreburn, L.C. in *Brown v. Dean* (1). Again, "the verdict must be very strongly against the evidence "to induce the Court to grant a new trial." Per Kay, L.J., in *Ferrand v. Bingley, etc., Local Board* (2). Finally, "Where there is evidence on both sides "properly submitted to the jury the verdict of the "jury once found ought to stand." Per Lord Fitzgerald in *Comrs. for Railways v. Brown* (3). To hold otherwise would be virtually in my opinion to put an end to trial by jury, and also to ignore the inestimable advantage possessed by the tribunal which hears the witnesses examined and cross-examined, and is, accordingly, able to judge with greater certainty as to the measure of credibility to be attached to their evidence.

The terms of the defendant's notice of motion to this Court next require consideration. It asks that the verdict and judgment entered for the plaintiff be set aside and that judgment be entered for the defendant. The grounds relied upon in support of the motion are :—

(*a*) That the answers of the jury to questions (*a*), (*b*) and (*c*) (other than their rider to their answer to question (*c*)) were made without evidence and against the weight of evidence, and that there was no evidence proper to be submitted to a jury, of negligence on the part of the defendant, and that the Lord Chief Justice should have directed in defendant's favour.

(*b*) Alternatively, that on the jury's answer to question (*c*) the Lord Chief Justice should have entered judgment for the defendant.

The first point to be observed in connection with this notice is that it is an application by the defendant for judgment, and for nothing else. It is not in the usual alternative form—for judgment or a new trial.

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(1) [1910] A.C. 373, 374.
(2) 8 T.L.R. 70.
(3) 13 App. Cas. 133.

It does not even ask "for such further or other order as to the Court may appear proper." I thought it possible that the omission of an alternative request for a new trial might have been a mere oversight which we could have rectified by amendment. Accordingly, I questioned the learned Attorney-General on the matter during the argument and received the following reply, which leaves on room for doubt:—"We have not asked for a new trial, so mis-direction "does not arise. We don't ask for a new trial if the "Court is against us on our application for judgment. "We want judgment or nothing." Whilst I am of opinion that it would be competent for this Court, if we so desired, to order a new trial notwithstanding that same has not been asked for, I am equally clearly of opinion that, having regard to the attitude taken up by defendant's counsel on his behalf, it would be wrong of us to do so in the present case. We should not force a measure of relief upon the defendant which he does not want, especially as it might be thought to prejudice his claim to the fuller relief which he seeks if the case should proceed further. In these circumstances, I deliberately refrain from expressing any opinion as to whether the defendant has brought his case within the principles which I have enunciated above as entitling a litigant to a new trial, and I proceed to consider his right to judgment.

This judgment he claims on three grounds, the latter two being alternative to one another. The first is that there was no evidence of negligence on the part of the defendant proper to be submitted to the jury. Secondly, that the plaintiff on her own case was guilty of such contributory negligence as disentitles her to damages. Thirdly, that the jury's answer to the third question submitted to them amounts to a finding of contributory negligence, and that there is no finding or even evidence that the defendant could by the exercise of reasonable care have avoided the consequences of such contributory negligence. I proceed to consider these submissions separately.

I shall deal first with the evidence of negligence on the part of the defendant. A great deal of comment was made by defendant's counsel on the absence of plaintiff from the witness box, or, at any rate, on the fact that her evidence was not taken upon commission, notwithstanding that her own doctor admitted on cross-examination that she was fit to give evidence in this way. Such comment, however, seems to me to be quite beside the point on an application for judgment, though it might be a very important and relevant topic on a motion for a new trial. The failure to produce the plaintiff or her evidence may affect, indeed necessarily does affect, the weight which should be attached to the other evidence given on her behalf, but it cannot eliminate it. She cannot be compelled to give evidence. If her advisers, whatever be their motive, think her case can be proved without calling her as a witness, they are entitled to do so.

A witness—James Robson—standing at the corner of Sandown Road, towards which plaintiff was crossing, said that he was looking towards the city and saw a light motor milk van coming from the city at a speed of fifteen to twenty miles per hour with its right wheel between the two outgoing tramlines. Behind it, at a distance of fifteen or twenty yards, was the defendant's motor bicycle catching up the milk van. The plaintiff left the kerb when the van was thirty yards away. At this time the defendant was six or seven yards behind the van and was not drawing out from behind it. The van slowed up, if anything, to pass behind the plaintiff, and the defendant on his motor bicycle came out from behind the milk van, accelerating as he did so. The defendant tried to pass between the plaintiff and the kerb towards which she was proceeding, but failed to clear her, and knocked her down half-way between the kerb and the ingoing tram rail (*i.e.*, five feet eight inches from the kerb on a thirty-six feet two inches roadway). Throughout the whole occurrence witness heard no horn sounded by the defendant.

A witness—James Olly—who only heard the crash, corroborates the position in which plaintiff was knocked down; so also does Thomas Gray, the proprietor of the fruit shop which plaintiff had just left; and the latter adds that the defendant's motor bicycle, with the engine still running, was lying on the ground fifteen yards from the plaintiff. No doubt Gray had estimated this distance at five yards in a statement which he gave to the defendant's solicitor, and there are other discrepancies between the evidence of the witnesses and their signed statements; but this only affected the weight of their testimony, and was essentially a matter for the jury. Robson's statement, upon which he was cross-examined, and which was put in evidence by the defendant, is of importance in explaining in further detail the events immediately prior to the plaintiff being knocked down. When the defendant cut out from behind the van the plaintiff was twelve yards away, and on seeing her he swerved further out to the right in an effort to avoid her, but he did not slacken speed.

Plaintiff's husband also gave evidence on her behalf. He saw the defendant at Dr. Irvine's house on the day of the occurrence and asked him how the accident happened, to which he replied that he came out from behind the van and it was impossible for plaintiff to have seen him coming. By two inches less he would have missed her. Asked if he sounded his horn, he said, "No, because if he did Mrs. Finlay (plaintiff) would "have stopped and he would have killed her." This part of the evidence was not denied by the defendant in the witness box; indeed, part of it was expressly confirmed. To me it is unintelligible. No doubt if by sounding his horn defendant had stopped the plaintiff and yet had himself maintained a straight course he might have killed her; but having determined to swerve to the right, as he in fact did, stopping the plaintiff was the one thing which would have ensured the avoidance of the accident.

This is the way the matter stood upon the evidence at the close of the plaintiff's case. It is significant that no application was made at this stage for a direction, though, of course, on the authority of *Banbury v. Bank of Montreal* (1), that omission would not prevent us entering judgment for the defendant if in fact he was then entitled to such direction. But

(1) [1918] A.C. 626.

was he so entitled? The defendant motor cyclist, when catching up a motor van which was proceeding at from fifteen to twenty miles per hour, accelerated and cut out without warning on to the wrong side of the street where he knocked down and injures a lady of fifty-three years of age, whom the defendant said could not have seen him coming. The motor cycle came to a stop fifteen yards away. No warning was given to the plaintiff even when the defendant saw her; no effort was made to slow down or stop the motor cycle before the collision. The defendant apparently thought he could get round in front of the plaintiff. He took his chance and failed. It might be that a jury on the whole case might reasonably have found that the plaintiff brought the trouble on herself, and that defendant did all that he could reasonably have done in the agony of the collision. But this was essentially a question for the jury, and I am quite unable to accept the argument advanced on behalf of the defendant that the facts which I have mentioned—whatever be their weight—do not constitute evidence of negligence proper to be submitted to the jury. Their functions we must not now usurp.

The matter does not, however, rest here. The defendant elected to give evidence. Certain of that evidence—both of himself and his witnesses—was no doubt favourable to his case and would have justified the jury in finding both the issues of his own negligence and of plaintiff's negligence in his favour had they thought right to do so. But in certain respects also his evidence assisted the plaintiff. He had had one previous accident. He had gone in also for a reliability trial; and at the time that he knocked down and injured the plaintiff he was out for a run to Comber to test his speedometer. He actually took part in a reliability trial that night, for which apparently he had come specially from England that morning. This evidence could scarcely fail to create an atmosphere in which the jury would consider it probable that the defendant was proceeding at the time of the accident at a speed which, having regard to all the circumstances, was excessive, and, accordingly, amounted to negligence. Twenty or twenty-five miles an hour may not be negligence, but in my opinion it cannot be affirmed in the circumstances of this case that it might not be reasonably held to amount to negligence. In any event it was essentially a jury question. The learned Lord Chief Justice, therefore, in my opinion, properly refused to direct on this issue at the close of the defendant's case.

I now pass on to the defendant's submission that he was entitled to a direction on the issue of contributory negligence. I shall assume that this was included in the application of the Attorney-General at the close of the evidence and in the notice of motion to this Court, though this is far from clear. Considerable doubt has at times been expressed both in judgments and text-books as to the right of a Judge to hold that contributory negligence has been conclusively established, and as to his right to take away the issue from the jury and direct in defendant's favour. Thus, in the 4th Edit. (1928) of *Beven* on "Negligence," there is to be found in the text at p. 160 the statement :— "It is indisputable that where the issue of contributory "negligence arises the matter cannot be withdrawn "from the jury" ; but the learned editors suggest in a footnote that this statement is rather too sweeping. At page 166, however, the text again says : "In this "view the question of contributory negligence can "never be withdrawn from the jury ; for the decision "of it necessitates the discriminating between different "sets of facts, and this is their peculiar province." After careful consideration, I accept without qualification the view expressed by the learned authors of the article on "Negligence" in *Halsbury's Encyclopædia of the Law of England*, Vol. 21, par. 755, where all the leading authorities on the subject are cited. It is there stated that a judge may non-suit or withdraw the case from the jury where on the undisputed facts of the case it appears that the accident was directly caused by the plaintiff's own negligence, although there may have been on these facts some negligence on the part of the defendant ; but this power should not be exercised except in a very clear case where the evidence is so strong that it would be wholly unreasonable for the jury to find that the plaintiff had not caused the accident by his own negligence. The whole question was considered at length by Palles, C.B., in *Coyle v. Great Northern Railway Co. of Ireland* (1), which was so strongly relied upon by the defendant. The Chief Baron refers to the opinion of Lord Penzance in *Dublin, Wicklow and Wexford Railway Company v. Slattery* (2), that the matter could not be withdrawn from the jury, and sets against that opinion a great mass of legal authority. The judgment of Lord Penzance on the abstract question that, no matter how clear the relation of cause and effect may be between the plaintiff's negligence and the injuries complained of, the question of contributory negligence cannot be withdrawn from the jury, he is wholly unable to follow. Why cannot an admission of the party supply the finding of the jury, and why cannot the evidence of a witness put forward by the plaintiff ? His own opinion, the Chief Baron continued, is that the question is whether the facts proved on the one hand amount to contributory negligence—that is, to what the Judge would be bound in law to hold was contributory negligence without drawing any inference of fact—or whether, on the other hand, they are only evidence of negligence ; for if they are only evidence of negligence and if the negligence is no more than an inference to be drawn from the evidence, in that case the negligence is an inference of fact, and the question cannot be withdrawn from the jury. He concludes that to justify the Judge in leaving the case to the jury, notwithstanding the voluntary act of the injured person which contributed to the injury complained of, the circumstances must be such as either firstly, to make the question whether that act is negligent (either *per se* or having regard to the conduct of the defendants inducing or affecting it) a question of fact ; or, secondly, the circumstances must be such as to render reasonable an inference of fact that the defendants by using due care could have obviated the consequences of the plaintiff's negligence.

(1) 20 L.R.I. 409, 417-18.

(2) 3 App. Cas. 1155, 1173.

I respectfully concur in every word of the judgment which I have just cited, and the law as there laid down is fully confirmed by Lord Hatherley in *Slattery's case* (1), and by Lord Watson in *Wakelin's case* (2). I emphatically re-affirm the right of the trial judge to withdraw the question from the jury and to non-suit the plaintiff on this issue of contributory negligence in a clear, proper and conclusive case. Such a case the Chief Baron held *Coyle v. Great Northern Railway Co. of Ireland* (3) to be, for the *undisputed facts* showed affirmatively that the man who was killed in crossing the railway line acted negligently and that his negligence, if not the sole, was at least a contributory cause of the accident. As Dowse, B., put it, "This is not a "case in which there is evidence from which a jury "may or may not infer that the deceased was guilty "of contributory negligence. The evidence is all the "one way; there is nothing for the jury to give their "opinion upon. The deceased could and should have "seen the train and thus escaped injury."

When I proceed, however, to apply these principles I find the first essential difference between the facts of the present case and those in *Coyle v. Great Northern Railway Co. of Ireland* (3) is that they are disputed. The plaintiff's witnesses have proved that before leaving the kerb and proceeding to cross the street she looked first towards Dundonald and then towards the city. According to Robson she walked across in front of the motor van, at first he said naturally, but he altered this, and said that she was walking quick and seemed to be in a hurry. The jury were in my opinion not only justified on this evidence, but practically coerced when the evidence of the defendant's witnesses had been given, in taking the view that she took an undue risk (which I interpret to be, was guilty of contributory negligence) in relation to the motor van; but I am unable to accept the submission of the defendant's counsel that it follows from this that she necessarily took an undue risk as regards the defendant. Mr. Murphy argued, "It is not undue risk *qua* one or

(1) 3 App. Cas. 1155, 1168.
(2) 12 App. Cas. 41, 48.
(3) 20 L.R.I. 409.

"other but *qua* all traffic." My first comment on this submission is that although the Lord Chief Justice reports to us that he charged the jury to the contrary effect, no ground of misdirection is relied upon in the notice to this Court. But, even if it is open to the defendant so to contend, how can his submission be accepted? If a person either sees a risk and takes it, or has an opportunity of doing so, yet wilfully shuts his eyes to it, the negligence is clear. The jury evidently considered such to be the plaintiff's conduct in regard to the motor van; but as regards the defendant they may well have come to the same conclusion as the Lord Chief Justice, that from her position on the kerb she did not see and could not reasonably have seen the defendant riding his motor bicycle a short distance behind the motor milk van; or they may have formed the opinion that, even if she did see him in that position, there was at that time no risk, so far as he was concerned, in her crossing the street, and that such risk only arose when the defendant without warning came out from behind the van, accelerated, and got on to his wrong side of the street. I do not say that I would necessarily have arrived at the same finding as the jury in negativing contributory negligence, but that does not justify this Court in setting aside their verdict and entering judgment for the defendant. The evidence given on behalf of the plaintiff did not amount to an admission of contributory negligence; and on either limb of the test contained in the proposition put by the Lord Chief Baron in *Coyle v. Great Northern Railway Co. of Ireland* (1), the learned Lord Chief Justice was amply justified in leaving the issue to the jury. The circumstances proved in *evidence* made the question of whether the plaintiff's conduct was or was not negligent a question of fact; and they also rendered reasonable the inference that even if there was such negligence, the defendant could have avoided the consequences of it if he had not taken so much upon himself, but, upon seeing the plaintiff, had exercised due care by stopping in what Robson estimated as a distance of twelve yards or by even reducing his speed instead of accelerating; by

(1) 20 L.R.I. 409.

Andrews, L.J.

giving warning of his approach ; or by keeping as far as possible to his own side of the road instead of yielding to what Mr. Murphy described as the instinctive impulse of pulling out to the right. All this was for the jury ; the facts admit of two reasonable views ; and I am therefore clearly of opinion that, even assuming contributory negligence to have been admitted or proved, there was ample evidence upon which the jury might reasonably have found that the defendant could have avoided its consequences.

The third ground relied upon by the defendant's counsel that the jury's answer to the third question amounts to a finding of contributory negligence is, as appears from what I have already said, quite untenable. Contributory negligence is expressly negatived in a discriminating answer which there is sufficient evidence to justify.

I may add that, although I have not referred in this judgment to some of the cases cited to us in argument, I have carefully considered them all. Most of them are referred to by the Lord Chief Baron in *Coyle v. Great Northern Railway Co. of Ireland* (1), and form the basis of his judgment. I am further of opinion that the extraction and citation of isolated passages from these cases as to what would constitute negligence or contributory negligence would not be helpful but only misleading. Many of them are concerned with accidents at level crossings—or at shunting—on railways, where the train was necessarily proceeding on a fixed line and the injured person's view was unobstructed. Expressions of opinion in such cases are not always necessarily applicable to street accident cases occurring in conditions of modern traffic.

In my opinion, the defendant's motion should be dismissed with costs; but, as I have the misfortune to differ from my colleague, our order will simply be that "No Rule" be made on the application.

Best, L.J.

Best, L.J. : This is an application by the defendant for an order that the verdict had and judgment entered for the plaintiff on the 28th day of January, 1931, be set aside, and `that judgment be entered for the defendant.

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(1) 20 L.R.I. 409.

The action was brought to recover damages for personal injuries caused to the plaintiff by the negligence of the defendant in the driving, management and control of a motor cycle on upper Newtownards road, in the city of Belfast, on 16th May, 1930.

The particulars of the negligence alleged were that defendant drove at an excessive speed dangerous in the circumstances, that he failed to give warning of approach, that he drove upon the wrong side of the road, that he failed to pull up and avoid striking the plaintiff, that he failed to keep a proper look out, that he had not his motor cycle under proper control, and that he passed or attempted to pass another vehicle without having ascertained that the road was clear and that he could safely do so.

The defendant by his defence denied that he was guilty of any negligence, and alternatively pleaded that the plaintiff contributed to the accident by her own negligence.

The action was tried by the Lord Chief Justice and a special jury and resulted in a verdict and judgment for the plaintiff, and the grounds on which the defendant seeks to have judgment entered for him are that the answers of the jury to questions (*a*), (*b*) and (*c*) submitted to them (other than the rider added by the jury to their answer to question (*c*)) were made without evidence and against the weight of evidence, that there was no evidence proper to be submitted to a jury of negligence on the part of the defendant, and that the Lord Chief Justice should have acceded to the application for a direction made to him by counsel on behalf of the defendant, and alternatively that on the jury's answer to question (*c*), the Lord Chief Justice should have entered judgment for the defendant.

The questions submitted to the jury with their answers were as follows :—

(*a*) Was the defendant guilty of negligence ?
Answer : Yes.

(*b*) Did it cause the accident ?
Answer : Yes.

(*c*) Was the plaintiff guilty of negligence? (By inadvertence, the words "Contributing to the accident" were omitted from the question). Answer: No, but we believe plaintiff took an undue risk in relation to motor van.

(*d*) If the plaintiff was guilty of negligence, could the defendant by reasonable care have avoided it? Not answered.

(*e*) Damages? Answer: £700 plus doctor's fees. £745 3*s.* 0*d.*

Just before the happening of the accident the plaintiff was in the shop of one Thomas Gray and, having transacted her business, she left the shop and proceeded to go in the direction of her own home, which is in Sandown Road. To reach Sandown Road, which comes into Upper Newtownards Road nearly opposite Gray's shop, it was necessary for the plaintiff to cross the footpath in front of Gray's shop, to cross Upper Newtownards Road, which at this point is over thirty-six feet wide, and to gain the footpath at the far side of the road. Upper Newtownards Road is one of the main thoroughfares in the east end of Belfast and the stream of traffic along it both outwards and inwards is very considerable. There are two tramway tracks in the road, the distance of the outside rail in each case being about eleven feet from the nearest kerb. Plaintiff herself was not examined at the trial nor was her evidence taken on commission though she was, according to the evidence of one of her doctors, fit to have her evidence so taken. At the time when the plaintiff was about to step off the path and cross the road a motor milk van was coming from Belfast, which was on the plaintiff's right, and it was followed by the defendant on his motor cycle. Plaintiff proceeded to cross the road. Thomas Gray stated that he watched her to the kerb on his own side, that he went to put money away, that he heard a crash, and he adds that he saw her look up the road towards Dundonald (which was on the plaintiff's left side) and then towards the city. He looked through the window and saw the plaintiff lying on the ground a couple of feet beyond the incoming tram line (which is the line farthest away from his shop), and someone drew his attention to blood which was a couple of feet beyond the ingoing tramline. He also stated that the motor cycle was on the ground near the middle of the opening of Sandown road, that the machine was running and that it was fifteen yards from Mrs. Finlay. In a statement taken on 29th October, 1930, by a clerk to the defendant's solicitors and signed by Gray, he had said that he did not watch her progress across the road, that his attention was first attracted by a crash, and that the motor cycle was lying on the road about five yards from where Mrs. Finlay was lying.

James Robson stated that at the time of the accident he was standing at the corner of Sandown Road looking towards the city (which would be to his left). He saw a light motor milk van coming from the city on the proper side of the road, its right wheel being between the two outgoing tram lines, and it was going between fifteen and twenty miles an hour. He saw it about Bethany Street (this would be about forty yards nearer Belfast than Gray's shop and on the same side of the road). The motor bicycle was fifteen or twenty yards behind, and was catching up on the milk van. He noticed the plaintiff on the footpath at Gray's and she was on the kerb when the milk van was at Bowman's shop, which is about twenty-five yards from Gray's shop. He said he saw the lady looking "both roads," then she came over, the milk van tried to pass behind her and slowed up, if anything. He noticed defendant, who came out from behind the motor van and seemed to go between the plaintiff and the kerb stone (this is the kerb on far side of road from Gray's) and he knocked her down, he accelerated when coming out from behind. Plaintiff was half way between the kerb and inside line when struck, and the bonnet of the motor had passed her. He (that is the driver of the milk van) could not have seen the accident. He said he heard no horn sounded by the defendant. In cross-examination, witness said that the plaintiff was walking "natural," she was walking quick, she seemed to be in a hurry, she looked both ways, she took a casual glance, she hurried across not close to the lorry, that the lorry was thirty yards away when the plaintiff left the kerb, that the cyclist was evidently intending to pass the lorry on his right side, that the cyclist was not on the incoming tram track but between the two lines of the outgoing track when the lady left the kerb, at which time the cyclist was six or seven yards behind the lorry and that it was not drawing out from behind the lorry.

This witness had also made a statement to the defendant's solicitors' clerk in which he said that he noticed the lady step off the footpath on the far side; she appeared to be in a hurry. He saw her give a casual glance and then hurry across the road, and when she had reached the centre of the two tram tracks the van would have been about fifteen yards away and it had turned a little towards the footpath on its own side, that the motor cycle was close up to the van at this time, that the driver of the motor cycle would have been seventeen yards from witness when he cut out to pass the van and that the plaintiff at that time would have been twelve yards away from the cyclist, that when the cyclist saw the lady he swerved further out to the right in an effort to avoid her but he did not slacken speed, and that the cycle struck the woman knocking her down, that she fell, six feet from the footpath and that the cycle was lying five yards from where the woman was lying.

According to the evidence of plaintiff's husband, who interviewed the defendant after the accident and asked him how it happened, the defendant said he came out from behind a motor lorry and it was impossible for Mrs. Finlay to have seen him coming, and that by two inches less he would have missed her. Asked did he sound the horn, the defendant said, "No, because if I had sounded it Mrs. Finlay would have stopped and I should have killed her." Defendant told this witness that he had done his best to avoid the accident.

For the defendant, Frank Kyle gave evidence that he was driving his father's motor van on the occasion and was coming from Belfast with empty milk cans, his brother Harry being seated in the back of the van. He was approaching the place where the accident occurred at about fifteen miles per hour, he saw a lady

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starting from the left kerb to run across the road when about six or seven yards distant from him, and he did not see her look either way. She ran across the road and he applied both brakes and swerved to the left to avoid hitting her, and if the brakes had not been good he would surely have hit her. His right mudguard just missed her by three or four inches, he looked through a pane of glass at his side and saw her hit by the motor cycle which was then in the centre of the ingoing tram line. So far as he could see, the cyclist could not have avoided the plaintiff. In cross-examination, witness said that plaintiff had one foot on the kerb when he saw her, that he stopped his van six or seven yards beyond where plaintiff was standing on the kerb, and that she went almost double our speed. (If the note be correct, I don't understand this, unless the witness means that after the brakes were applied the plaintiff was going faster than the milk van). He further said that the defendant could not have cleared the lady by getting next the lorry as he would have risked his own life.

The defendant, who had had one accident previously in which no one was hurt, said that he had been following the van, which was about ten yards in front of him, up the road for about a quarter of a mile, that he knew Sandown Road, and before he came to it he had been waiting for an opportunity to pass the van, but was prevented from doing so by cityward traffic, that he waited until he could see a considerable distance up Sandown Road and when he found it clear, he pulled out to pass. He was then between the two tram tracks right in the centre of the road, and once he started to swing out he sounded his electric horn, the road ahead being then clear. He accelerated to a speed of twenty to twenty-two miles an hour and as his head drew level with the back wheel of the van he saw the head and shoulders of a woman (the plaintiff) appear above the front mudguard of the van. She was about one yard in front of the mudguard and only the van's length in front of himself. Plaintiff was hurrying and defendant said that he could not hope to pull up in that length so he immediately swerved as violently as he could to the right. He almost avoided touching plaintiff but his left foot-rest caught her and tripped her and owing to the swerve he fell to the ground, the road being wet at the time. On cross-examination, the defendant said he was from two and a half to three yards from the lady when he first saw her, that her husband's account of the conversation was correct and that he had not sounded his horn after seeing the plaintiff. In re-examination, he said that it was only at the third interview that Finlay (plaintiff's husband) said he was to blame.

Harry Kyle corroborated his brother's evidence about the plaintiff stepping off the footpath and said that when the brakes of the milk van were applied he was thrown off his seat and some milk cans were turned over. In cross-examination, he said the lady ran and that defendant had drawn out to pass at the time that he (Kyle) saw the lady.

At the close of the evidence, the Attorney-General applied to the Judge to direct the jury to find a verdict for the defendant on the grounds :—

(*a*) that there was no evidence proper to be submitted to the jury on which they could find a verdict for the plaintiff ; and

(*b*) that a verdict found for the plaintiff would be against the evidence and the weight of evidence.

The Lord Chief Justice refused to direct.

After an absence of an hour, the jury came into Court and asked in writing whether " negligence " in question (*c*) includes negligence relating to the motor lorry or only in relation to the motor cycle.

The jury having been requested to withdraw, Mr. Lowry, asked the Lord Chief Justice to tell them that negligence merely in respect of the lorry was not negligence in respect of the cycle, whilst the Attorney-General asked him to tell the jury that if the lady was negligent as regards the lorry, she must on the evidence have been negligent as regards the motor cycle. The Lord Chief Justice said " Not so," as she could not have known that the cycle was there with the lorry between them, and he then proceeded to direct the Jury as follows : " You have put a very difficult question to me "and I will try to answer it. You must consider "whether the lady was negligent in regard to the "motor cycle. That is one of the issues you will have "to try, and it is suggested that you might find she "was negligent in regard to the motor cycle if immediately before she rushed out she had been negligent "in respect of the lorry; but it does not necessarily "follow.

"You might draw the inference if you wish to "distinguish between the two things (that there was "nothing to prevent her seeing the motor lorry but "she had not any idea that the motor cycle was "coming. It may be difficult for you to say she was "negligent in regard to a vehicle she never saw."

The jury in a short time answered the questions as already set out.

The learned Lord Chief Justice reports that he found the case to be a difficult one, and that it appeared to him that the cause of the accident was that, owing to the intervention of the lorry in the field of vision, the plaintiff never saw the defendant's cycle at all. Was she to blame for the consequence of this? For a similar reason the defendant never saw the plaintiff or that she was about to cross the street. Should he, riding a motor cycle with one-third of his own immediate field of vision ahead blocked by the lorry, have made provision for a possible plaintiff? This, he says, he left to the jury. He adds that if they had found that neither was to blame or that each to some extent was to blame, no criticism would, he thought, be possible.

As regards question (*d*), he told the jury that so far as he could see, the defendant in a sudden emergency had done all he could to avoid the accident, that Mr. Lowry had said he should have stopped dead, but was that reasonable or even possible?

Plaintiff before proceeding to cross the road appears to have taken no more than a casual glance to right and left. If she had looked carefully to her right, which it was plainly her duty to do, having regard to the traffic likely to be on the road, there was nothing, so far as the evidence shows, to prevent her having a clear view of the milk van and of the motor cycle following a few yards behind. She had as good an opportunity of seeing these vehicles as Robson had, who was on the opposite side of the road. If she had seen the motor cyclist she ought to have observed, as Robson did, that he intended to pass the lorry, and even if she could not be expected to draw this inference, the danger of crossing before two oncoming vehicles separated only by a few yards should have deterred her from making the attempt. If she did not look carefully or at all to her right before proceeding to cross the road, she was clearly negligent as regards any traffic that might be coming from the city.

The rider which the jury added to their answer to question (*c*) can, in my opinion, only mean that they considered the plaintiff guilty of negligence as regards the motor van, and there is evidence to support such a conclusion.

Further, I am of opinion that the plaintiff, having been negligent as regards the lorry, having taken the chance of getting safely across in front of it, which by Kyle's quick and skilful handling she just managed to do, took no precaution against the possibility of the cycle or any other motor vehicle being behind the lorry and placed herself in a position which might be, and proved to be, extremely perilous, and I think that the finding of the jury that she was not negligent as regards the motor cycle is not supported by any evidence. We do not know from the plaintiff herself what she saw or what she did not see. If she saw the motor cycle as well as the van, she was, using the words of the jury, taking an undue risk as regards it, and if she did not see the motor cycle, her glance to the right must have been of the most casual character. It is mere speculation entirely unsupported by evidence to suggest that owing to the intervention of the van, plaintiff was unable to see the defendant's cycle.

According to the evidence of all the witnesses who speak to the point, the defendant was on or near the middle of the road at the instant when he first saw the plaintiff; he was then travelling at twenty to twenty-two miles an hour, which in the circumstances and with the road clear a moment before was not an excessive speed. In this state of affairs, what was the defendant to do ? It is suggested that instead of swerving violently to the right, he might have pulled to the left or have stopped dead, but, on the only evidence given, neither alternative was practicable. Frank Kyle's evidence is that defendant could not have cleared the plaintiff by getting next the lorry, *i.e.*, by pulling to the left, and that if he had done so he would have risked his own life.

Defendant himself says that he could not have hoped to pull up in the length which separated him from plaintiff when he first saw her. According to Robson, when the plaintiff left the kerb the cyclist was six or seven yards behind the lorry and he had previously said that the cycle was catching up on the lorry, so that when plaintiff emerged from the front of the lorry the cyclist must have been less than six or seven yards from the lorry, while the defendant says that at that moment he was level with the back of the lorry. Assuming the respective positions of the plaintiff and the defendant to be even as described by Robson, I fail to see how the defendant could have stopped his cycle in time to save the plaintiff, and the only evidence on this point is that it was impossible to save her by pulling up. There is nothing to the contrary but the suggestion of the plaintiff's counsel.

No evidence was given that any other course than that taken by the defendant was either practicable or safe for the plaintiff or himself, and I think that failure to avoid the collision by taking the only practicable course open to the defendant in the circumstances is not negligence on his part.

It appears to me, therefore, that there was no evidence proper to be submitted to the jury from which they ought to infer that the defendant was guilty of any negligence, and that the learned Lord Chief Justice should have directed in his favour.

If I am in error in arriving at this conclusion and if the true view be that there is such evidence and that the jury's finding cannot be disturbed, I think that defendant is, nevertheless, entitled to judgment on the ground that if the Jury had found, as in my opinion they should have found, plaintiff guilty of negligence, they ought in that event on the evidence to have answered question No. (*d*) in defendant's favour. I cannot see that defendant in the circumstances in which he found himself could have acted in any better way than he did.

It may be added that the Lord Chief Justice was of opinion that the jury ought to have answered the question in that way if it had become necessary for them to consider it, for he says he told them that so far as he could see, the defendant, in a sudden emergency, had done all he could to avoid the accident.

For these reasons judgment should, in my opinion, be entered for the defendant with costs of the action and of this motion.

Solicitor for the plaintiff: *J. Morris McKee.*
Solicitors for the defendant: *C. & H. Jefferson.*

NOTE.—After the above judgments were delivered, an appeal to the House of Lords was entered by the defendant. This appeal, however, was subsequently compromised.

J. McC.

C.A.
1931.

Nov. 11.
Dec. 18.

KEANE AND VANCE v. GOODFELLOW (1).

Landlord and tenant—Drainage rate paid by landlord in respect of tenant's holding—Tenant's liability therefor after passing of Drainage Act (Northern Ireland), 1925 (15 & 16 Geo. 5, c. 24) s. 5 sub-ss. 1, 2, 3, and 4, s. 16 sub-ss. 2 and 3 and Sch. II Local Government (Ireland) Act, 1898 (61 & 62 Vict., c. 37), ss. 52 and 54, Northern Ireland Land Act, 1925 (15 & 16 Geo. 5, c. 24) s. 27.

The defendant was the tenant of two holdings which, prior to the year 1925, were drained and improved by a drainage scheme constituted under the Drainage and Improvement of Lands (Ireland), Act, 1863. The rate payable in respect thereof to the T. River Drainage Board had always been paid by the landlord, and by an order of the Irish Land Commission, fixing a fair rent in respect of the holdings, it was declared that the said rent had been fixed on the basis that the drainage rate payable in respect of the lands in question should be borne by the landlord, without power to cast any portion of the liability on the tenant.

Upon the passing of the Drainage Act (Northern Ireland), 1925, the County Council of T. formulated a scheme for undertaking the work formerly carried on by the T. River Drainage Board. Section 5, sub-s. 2, of this Act provides that the expense of carrying out and maintaining such drainage works shall be raised by means of a poundage rate "made for each local financial year on the several occupiers of the lands assessed. . . ." The scheme, which was duly confirmed by the Ministry of Home Affairs, accordingly provided that the charges thereunder should be payable by the occupiers of the lands affected.

The defendant paid the charges levied in respect of his holdings but claimed to be entitled to deduct the amount thereof from the rent paid by him to the plaintiffs.

Held, by the Court of Appeal that notwithstanding the fact that the rate had previously been paid by the plaintiffs, and that their liability was evidenced by the fair rent order, the effect of the Drainage Act (Northern Ireland), 1925, was to cast this liability upon the tenant without the right to be indemnified by the plaintiffs in respect thereof.

Case Stated by Moore, L.C.J., as Judge of Assize, on an appeal from a decree pronounced by the County Court Judge of Tyrone.

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(1) In the Court of Appeal before Andrews and Best, L.JJ.

The Case Stated was as follows :—

"The plaintiffs in this case brought a civil bill against the defendant for recovery of the sum of £15 15*s.* 0*d.*, being one year's rent, use and occupation of the defendant's holdings under the plaintiffs in the Townlands of Mullaghcreevy and Aghareaney in the County of Tyrone up to and ending the 1st November, 1930, held by the defendant at the judicial yearly rent of £15 10*s.* 0*d.* and yearly rent of 5/– respectively.

The defendant filed a set-off for £1 6*s.* 8*d.*, being amount paid by him on 4th September, 1930, for the first moiety of Torrent River Drainage rate made on 16th June, 1930, the moiety being for the service of the half-year ending 30th September, 1930, and the defendant lodged in Court £14 8*s.* 4*d.* being the amount of the rent claimed, less the said sum of £1 6*s.* 8*d.*

The County Court Judge held that liability for the drainage rate had been cast by the Drainage Act (Northern Ireland), 1925, upon the occupiers of the lands and that the occupier was accordingly liable to pay the drainage rate ; this being so the tenant was not entitled to deduct the drainage rate from the amount of the rent due by him, and he gave a decree for the full amount, £15 15*s.* 0*d.*. From this decision the tenant appealed to the Judge of Assize and it was agreed on behalf of the plaintiffs and defendant that a case should be stated.

The following facts are admitted :—

(*a*) That the rent sued for is due.

(*b*) That the amount of drainage rate claimed by the tenant has been paid by him.

(*c*) That by order of the Court of the Irish Land Commission, dated 23rd June, 1883, the fair rent of the Mullaghcreevy holding was fixed at £19 10s. 0d., and it was declared by said order "that the said rent has been so fixed on "the basis that the drainage and maintenance "rates payable to the Board of Works in respect "of works already executed, by which the said "holding is benefitted, shall be borne by the "landlord without power to cast any portion "of the liability on the tenant."

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Keane and Vance v. Goodfellow.

(*d*) That by agreement, dated 11th January, 1900, and filed in the Court of the Land Commission on 19th April, 1900, the fair rent of the Mullaghcreevy holding was fixed at £15 10*s*. 0*d*.. In this agreement there is no mention of drainage rate.

(*e*) That up to and including the year 1925 the drainage rate payable to the trustees of the Torrent River Drainage Board was paid by the plaintiffs.

(*f*) Under the Drainage Act (Northern Ireland), 1925, the Tyrone County Council formulated a scheme for undertaking the drainage work formerly done by the Torrent River Drainage Board. This scheme was the subject of an inquiry by the Ministry of Home Affairs and an objection being lodged on behalf of the plaintiffs, the defendant's name, as occupier of the lands, was inserted instead of the plaintiffs.

(*g*) Under the scheme formulated by the Tyrone County Council and approved by the Ministry of Home Affairs the County Council has no power to do new work but is confined to maintaining the work originally done.

(*h*) Under paragraph 10 of the scheme adopted by the County Council the rate is payable by each occupier upon the increase in the value of the lands drained or improved.

The question at issue is :—

Is the defendant entitled to recover from the landlords the sum paid by him for drainage rate assessed under the scheme adopted by the Tyrone County Council? If this question is answered in the affirmative the decision of the County Court Judge should be reversed. If the question is answered in the negative the decision of the County Court Judge should be affirmed."

Section 5 sub-s. 2 of the Drainage Act (Northern Ireland), 1925, provides as follows :—

"The expenses of carrying out and maintaining "the drainage works shall be raised by the county "council by means of a poundage rate (in this Act "referred to as 'the drainage rate') made for each "local financial year on the several occupiers of the "lands assessed to the drainage rate according to "the respective assessments fixed by the scheme "or by the Commissioner of Valuation under this "Part of this Act."

Murphy, K.C., and *McSparran* for the defendant.

The order of the Land Commission fixing fair rents in respect of the lands, evidences a contract between the parties whereby, apart altogether from any statutory liability, the landlords undertook to pay the drainage charges. Although the Drainage Act (Northern Ireland), 1925, places the liability for the payment of the drainage rate upon the occupiers of lands benefitting by the scheme, the provisions of this Statute cannot affect the pre-existing contractual obligations, and the tenant upon whom the rate is now levied is entitled to be indemnified by his landlords in respect thereof.

There is nothing to prevent the parties from contracting out of the Act.

McCoy for the plaintiffs.

The drainage rate was a liability imposed by the Drainage (Ireland) Act, 1842, and all subsequent Drainage Acts, upon the proprietors of lands. It was accordingly not a contractual but a statutory obligation and thus the parties cannot be said to have contracted out of their rights and liabilities in respect of the payment of the rate. Section 5 sub-s. 2 of the Drainage Act (Northern Ireland), 1925, relieved the landlord of this statutory obligation and placed it upon the occupier. This was done in anticipation of the vesting of all tenanted lands in the Land Purchase Commission pursuant to the provisions of the Northern Ireland Land Act, 1925. Under the provisions of this Act, which had received the Royal assent six months prior to the former Statute, each tenant would in due course become both occupier and proprietor of his holding. Any injustice which might have ensued is obviated by Section 27 of the Northern Ireland Land Act which makes provision for a deduction from the purchase money in respect of any drainage works maintained by the landlord prior to the vesting, and the application of the amount so deducted towards the maintenance of such works. *Cur. adv. vult.*

ANDREWS, L.J.

ANDREWS, L.J.: The facts set out in this Case Stated raise an interesting question as to the incidence of a drainage rate payable under a scheme promoted by the County Council of Tyrone, pursuant to the powers vested in them by the Drainage Act (Northern Ireland), 1925. The rate was levied upon and has been paid by the defendant, who is the tenant in occupation of certain scheduled lands which are drained and improved by the scheme.

All the material facts are admitted and the question is purely one of law. For very many years past a drainage authority or drainage board has been in existence constituted under the Drainage and Improvement of Lands (Ireland) Act, 1863, in whom was vested the execution and maintenance of drainage works in the River Torrent Drainage District. We have not in evidence a copy of the award made under that Act in respect of this District; but it is admitted that up to and including 1925 the drainage rate, payable in respect of these lands to the Board, was paid by the plaintiffs, who were liable for same as "the proprietors" within the Drainage Acts. This liability was recognised by the Court of the Irish Land Commission, who by order, dated 23rd June, 1883, fixed the fair rent of the holding at £19 10*s.* 0*d.*, and declared "that the said rent has been so fixed on the basis that "the drainage and maintenance rates payable to the "Board of Works, in respect of works already executed, "by which the said holding is benefited, shall be "borne by the landlord without power to cast any "portion of the liability on the tenant." Declarations such as this were frequently embodied by the Land Commissioners in their orders fixing fair rents. There is no doubt as to the jurisdiction to make such orders *Gabbett v. McCarthy* (1); and the advantage and convenience of such declaratory orders is apparent. When by agreement, dated 11th January, 1900 (filed 19th April, 1900) the fair rent was reduced to £15 10*s.* 0*d.*, no mention was made of drainage or maintenance rates; but both parties have ever since recognised that the liability for payment of the rates remained, under the Acts, on the landlord, as had been declared by the order of 23rd June, 1883.

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(1) 30 L.R. Ir. 720.

The Drainage Act (Northern Ireland), 1925, effected many important alterations in the law. County councils were empowered to carry out drainage schemes, and provision was made for the transfer to them of the functions of existing drainage authorities. Schemes under the Act may be either—

(*a*) a "minor scheme," which embodies an agreement entered into with the several occupiers of the lands for the recovery from those occupiers of the cost, and does not provide for the imposition of a drainage rate; or

(*b*) a "major scheme," which must specify the several matters referred to in Schedule II, Part I, of the Act, including an estimate of the cost of the scheme and of the amount of the drainage rate proposed, together with provisions for the raising and recovering of the expenses of carrying out the scheme and maintaining the works when completed.

One of the most important provisions of Part I of the Act relating to major schemes is section 5, which deals with the expenses of executing such schemes. Sub-s. 1 creates as the basis of assessment for the purpose of drainage rate, the estimated increase of annual value of the lands, having regard to the different degrees of benefit which they will be likely to derive from the proposed drainage works. This is a benefit which, of course, directly accrues to the occupier; and, in furtherance of this principle of imposing the burden on the party benefitted, sub-s. 2 provides that the expenses of carrying out and maintaining the drainage works shall be raised by the county council by means of a poundage rate (referred to as "the drainage rate") made for each local financial year on the several occupiers of the lands assessed to the drainage rate according to the respective assessments. Sub-s. 3 enacts that the drainage rate shall be made at the same time and shall be recoverable in the same manner and by the same remedies as the poor rate (all of which is, of course, since the Local Government (Ireland) Act, 1898, leviable upon the occupier), and may be collected with the poor rate ; and, finally, sub-s. 4 enables provisions to be inserted in a major scheme for the making of contributions towards expenses out of the county fund, the amount of such contributions to be raised by means of the poor rate. The liability of the occupiers for the drainage rate is, therefore, fundamental to any major scheme under the Drainage Act (Northern Ireland), 1925.

There is yet another class of scheme provided for by Part II of the Act under which a transfer is effected to a county council of the business of an existing drainage authority. Technically speaking, this is not a " major scheme " ; but section 16 sub-s. 2 provides that the provisions of Part I shall apply in relation to the preparation and confirmation of any scheme for the purposes of Part II of the Act as if it were a major scheme within the meaning of Part I. Section 16 sub-s. 3 provides for the contents of such " transfer " schemes. These include the levying by the county council of any maintenance rate which was, immediately before the transfer, leviable by the drainage authority under the Drainage Acts, and the raising of that rate by the county council. Power can also be taken in the scheme to raise annual or other contributions to be applied towards the expenses of the works by means either of a new drainage rate made under Part I or by means of the poor rate.

The River Torrent Drainage Scheme, under which the drainage rate with which we are concerned in the present case was imposed, was a transfer scheme prepared under Part II of the Act. It recites an order made by the Ministry of Home Affairs on 4th September, 1926, directing that the business of the Drainage Authority of the Torrent Drainage District should be transferred to the County Council of Tyrone, and that the County Council were, in pursuance of the Drainage Act (Northern Ireland), 1925, required to formulate a scheme for the maintenance of the drainage works. It further recites a resolution of the County Council approving of the formulation of a scheme. The scheme, which was duly confirmed by the Ministry of Home Affairs, specifies the works to be maintained; and in clause 5 provides that the occupiers for the time being of the lands shall in future be annually charged towards the costs and expenses which may from time to time be incurred, the rate payable in respect of such lands respectively being apportioned as set forth in the schedule attached to the scheme. Clause 8 empowers the County Council to raise a new drainage rate under Part I of the Act for all the expenses of the maintenance of the drainage works transferred, such rate to be recovered in the same manner and with the same remedies as the poor rate. Finally, in clause 10 it is provided that the drainage loan rate and drainage maintenance rate, therein estimated, shall be payable by each occupier upon the increase in the value of the lands drained or improved comprised in the schedule.

The scheme to which I have referred was, as originally drafted, the subject of an inquiry by the Ministry of Home Affairs; and it appears by the Case Stated that an objection lodged by the plaintiffs resulted in the liability for the drainage rate being thrown on the occupiers instead of, as in the original draft, on the plaintiffs. This was in my opinion a proper amendment, as it made the scheme conform to the underlying principle of liability under the Act to which I have referred. When confirmed by the Ministry the scheme became final and had effect as if enacted in the Act. (See Schedule II, Part I, clause 5, which is made applicable to transfer schemes by the joint operation of section 16 sub-s. 2 and section 1 sub-s. 4 of this Act.)

The question arises in the present case in reference to a payment of £1. 6*s.* 8*d.* made by the defendant on 4th June, 1930, being the first moiety of the rate for the service of the half year ending 30th September, 1930. This sum the defendant seeks to set off against his landlord's claim for rent, submitting that the Act and scheme only established his liability to the County Council, as the rate collecting authority, for convenience of collection, and that they had not the effect of altering the incidence of liability for drainage rates as between the landlord and his tenant, which had been established in the earlier Acts and recognised in the fair rent order.

The manifest injustice, which would result to the tenant from transferring the liability from landlord to tenant, without adjustment of rent or compensation of any kind, pressed strongly upon me during the arguments ; and it is, therefore, only with the greatest reluctance that I have been forced to the conclusion that the legislation has this effect. I cannot allow considerations of hardship to weigh with me to the extent of giving a forced and limited construction to the clear language of both Act and scheme, though such considerations might be important if the language were ambiguous. If it was the intention of Parliament that the alteration in liability should be of the limited character contended for by the defendant, this could have been easily carried out either by the insertion of limiting or restricting words, or by the introduction of a section couched in similar terms to section 54 of the Local Government (Ireland) Act, 1898, which enabled rents to be adjusted as between landlord and tenant in consequence of the change in the incidence of poor rate effected by section 52 of that Act. The existence of such an adjustment section in the Act of 1898, coupled with its omission from the Drainage Act, 1925, has, to my mind, a twofold significance. In the first place, it shows that similar, though not identical, language in the Act of 1898 did in fact alter the incidence of that part of the poor rate which was previously paid by the landlord ; and that the only way in which the change of burden could be prevented and the injustice avoided was by inserting this special adjustment section affecting existing tenancies. Secondly, when Parliament had such a clear precedent in an absolutely parallel case, and yet did not provide for adjustment of rent as in the former case, the only conclusions that can be drawn are either that it was a *casus omissus*, the mind of Parliament not being directed to the point, or else that Parliament, though fully conscious of the matter, did not intend that any such adjustment should be made. I think it is quite possible and, indeed, probable that it was considered at that time that, having regard to the provisions of the Northern Ireland Land Act, 1925, which had been passed six months previously, any such provision would be unnecessary. That Act provided for the compulsory purchase through the Land Purchase Commission of all unpurchased tenanted land, which would, accordingly, terminate the relationship of landlord and tenant. The appointed day for the purchase was, under section 35, to be such day or days, not being more than four years after the passing of the Act, as should be fixed by the Commission, subject to such right of extension of the four years' period as is therein mentioned. With this Act of the Imperial Parliament upon the statute book, the Parliament of Northern Ireland may well have thought that the appointed day would have arrived in respect of all tenanted lands, including those subject to drainage rates, before new schemes for drainage under the Act of 1925 had been prepared, confirmed, and become operative. If, however, this expectation were in any case not realised, they may well have considered that the temporary injustice resulting from the payment of a small drainage rate might be allowed to fall within the principle of *de minimis non curat lex;* and that it did not justify the establishment of machinery for the adjustment of rents with all the trouble and expense which this would necessarily involve.

I have referred to the injustice as a temporary one, for such it clearly is. Section 27 of the Northern Ireland Land Act, 1925, provides that where a watercourse, drain, or other work has, prior to the sale of a holding, been cleansed or maintained in whole or in part by the landlord or at his expense, the Judicial Commissioner may direct that there shall be deducted from the purchase money and transferred and applied in manner provided, a sum which will yield an income equivalent to the average annual expenditure incurred by the landlord in such cleansing or maintenance during the period of ten years preceding the date of the passing of the Act. It is unnecessary for me for the purposes of this judgment to refer to the manner in which sums so deducted from the purchase money are dealt with under the Act and the general order of the Court made by the Judicial Commissioner on 6th December, 1929. Suffice it to say that the Judicial Commissioner held in *Collum's Estate* (1), that section 27 applied not merely, as was at first thought, to works of a local character maintained by the landlord at his own expense, but that under it a deduction was also properly made in respect of a drainage maintenance rate levied on the lands and paid, as was the River Torrent Drainage Maintenance Rate, by the vendor prior to the sale. The Judicial Commissioner also construed section 27 in *Egerton's Estate* (2), holding that the words "may direct" should be read "shall direct." Referring to the purchasing tenant's position after the appointed day, he pointed out in these cases that the section met the justice of the case. The tenant had had to pay a greater rent because of his landlord's obligation in respect of repairs or maintenance. After vesting he would cease to have any such rights or advantages as he had previously enjoyed at the expense of the landlord. As the purchase money under the Act is, however, automatically fixed on the basis of the rent, a permanent injustice would have been done to the purchasing tenant had it not been for section 27, which provides for a deduction being made from the purchase money of a sum which will yield an income equivalent to the average annual expenditure incurred by the landlord during the ten years period preceding the passing of the Act. This reduction in the standard price of the holding necessarily occasions a corresponding reduction in the standard purchase annuity which the purchasing tenant would otherwise have been liable to pay. In this way an adjustment is effected which is equitable to the tenant purchaser after the sale; and, accordingly, the injustice to which I have referred and from which the tenant suffers

(1) [1929] N.I. 143. (2) [1929] N.I. 106.

ANDREWS, L.J.

between the date upon which a drainage scheme under the Act of 1925, comes into operation and the appointed day is of a purely temporary character. This hardship to the tenant, evident though it be, cannot, however, be remedied by this Court, whose duty it is not to legislate but to interpret the law as it finds it. We cannot consistently hold, in the absence of any qualifying or restrictive words to justify it, that the words of an Act of Parliament and of a scheme made thereunder which impose a liability upon an occupier, apply to a tenant when he becomes a purchaser after the appointed day, but do not apply to him before that day. At both periods he is the occupier; and, in the absence of express words directing adjustment as between landlord and tenant, or, as in the case of the Drainage Act, 1863, section 54, authorising deduction from the rent, that liability must remain where it is laid by the Statute—on the tenant.

The answer to the question submitted to us will be in the negative, and the plaintiffs will have £12 12*s.* 0*d.* costs of this Case Stated.

BEST, L.J.

BEST, L.J.: His Lordship having stated the facts and referred to the Case Stated, continued:—

The question for decision is whether the defendant is entitled to recover from his landlords, the plaintiffs, the sum paid by him for drainage rate assessed under the the scheme adopted by the Tyrone County Council.

The council of each county in Northern Ireland, other than a county borough, is empowered by the Drainage Act (Northern Ireland), 1925, to prepare, confirm and carry out schemes for drainage works, and for that purpose to acquire such land, water and other rights as may be necessary.

Section 1 sub-s. 3 defines "a minor scheme" under the Act and by sub-s. 4 of the same section it is enacted that the provisions of Part I of the Second Schedule to this Act shall have effect in relation to the preparation, confirmation and carrying out of schemes to which the last preceding sub-section does not apply, and any such scheme is in this Act referred to as "a major scheme."

Section 15 of the Act provides for the transfer to county councils of the business of existing drainage authorities, and section 16 authorises the county councils to prepare schemes for maintaining the drainage works which become maintainable by them under the provisions of Part II of the Act, and otherwise for carrying out the business of any drainage authority arising in relation to such drainage works, and sub-s. 3 sets forth the necessary ingredients of every such scheme.

In particular sub-s. 3 (*c*) provides as a necessary part of the scheme for the levying by the county council of any maintenance rate which was, immediately before the transfer, leviable by the drainage authority under the Drainage and Navigation (Ireland) Acts, 1842 to 1857, or the Drainage and Improvement of Lands (Ireland) Acts, 1863 to 1893, and the raising of that rate by the county council.

It was by virtue of the provisions of section 16 that the scheme for the River Torrent Drainage District was formulated by the County Council.

Clause 4 of the scheme provides that the proportions in which the said lands (*i.e.*, the lands drained and improved by the scheme) are so drained and improved are those set out in schedule A, attached to the scheme, and clause 5 provides that the occupiers for the time being of such lands in respect thereof respectively shall in future be annually charged towards the costs and expenses which may from time to time be incurred in or about the maintenance, cleansing and upkeep of the works comprised in the said report (*i.e.*, the report of the county surveyor) and the rate which shall be payable in respect of such lands respectively, towards such costs and expenses as last aforesaid, shall be apportioned as respectively stated and set forth in schedule A aforesaid, and by clause 6 the council shall be entitled to levy any maintenance rate which was immediately before the transfer leviable by the former drainage authority.

By section 16 sub-s. 2 of the Act the provisions of Part I of the Act shall apply in relation to the preparation and confirmation of any scheme for the purposes of this Part (*i.e.*, Part II) of the Act, as if it were a major scheme within the meaning of the said Part I and, accordingly, by section 1 sub-s. 4 of the Act, the provisions of Part I of the Second Schedule to the Act apply to the River Torrent Drainage Scheme.

Section 5 of Part I of the said Second Schedule provides that the scheme shall not take effect unless and until it is confirmed by the Ministry of Home Affairs, but when so confirmed shall become final and have effect as if enacted in this Act.

The scheme was duly confirmed by the Ministry of Home Affairs and has thus the same validity as if enacted in the Statute.

Section 5 sub-s. 2 of the Act, which deals with major schemes, provides that the expenses of carrying out and maintaining the drainage works shall be raised by the county council, " by means of a poundage rate (in this Act referred to as 'the drainage rate'), made for each local financial year on the several occupiers of the lands assessed to the drainage rate according to the respective assessments fixed by the scheme. . . ."

The effect of section 5 of the scheme, following the provisions of section 5 sub-s. 2 of the Act, is to cast upon the occupier of lands which are assessed to drainage rate the burden of paying that rate.

Mr. Murphy contends that although the County Council can recover the rate from the tenant, as was done in this case, yet the tenant is entitled to be indemnified by plaintiffs against the payment of such rate by virtue of an agreement entered into between him and them.

He admits that prior to the order of the Irish Land Commission, dated 23rd June, 1883, the landlord was bound under the Drainage Acts, as then in force, to pay the drainage rate on the holding, but he says that that order evidences a contract between the parties, by which, apart from Statute, the landlord undertook to pay the drainage and maintenance rates payable to the Board of Works in respect of works already executed on the holding; and he says further, that the contract was impliedly continued by virtue of the fair rent agreement entered into between the parties on 11th January, 1900, and filed in the Land Commission Court on 19th April, 1900. Further, he says that the agreement was subsisting at the date when the defendant paid the drainage rate now in question and that he is entitled, notwithstanding the provisions of section 5 sub-s. 2 of the Act, and of section 5 of the scheme, to recover back from the landlord the sum so paid.

I cannot accept his argument.

Down to the passing of the Drainage Act of 1925, and until a scheme was confirmed and a rate thereunder levied by the county council, the liability of the landlord under the existing Drainage Acts was clear. The declaration in the fair rent order of 23rd of June, 1883, that the rent was fixed on the basis that the landlord should be liable for the payment of drainage and maintenance rates cannot, in my opinion, be regarded as evidence of a contract between landlord and tenant that the landlord should henceforth bear the burden of those rates. He was liable to pay them under the law as it stood at the time of the making of the said order, and in the absence of strict proof to the contrary, I refuse to hold that his statutory liability for payment of the rates was to be put upon a contractual basis.

Mr. Murphy makes the further point that the liability of the landlord continues until the holding has been vested in the Land Purchase Commission, and that it did not vest until 15th July, 1931, a date subsequent to that at which liability for the payment of the rate arose.

As already stated, there was, in my opinion, no contract between landlord and tenant whereby the landlord bound himself to pay the drainage rate, but if the inference must be drawn from the fair rent order of 23rd June, 1883, that such a contract was entered into, I hold that it was ended by the provisions contained in section 5 sub-s. 2 of the Act combined with those of the County Council's drainage scheme. All rates levied under the scheme are to be charged upon the occupiers and from the date of the confirmation of the scheme such rates are no longer payable by the landlord but by the occupier of the lands. This appears to me to be the plain intention of the Legislature.

From the date of vesting it is clear that the occupier must pay any rate levied on his lands, and if the Legislature had desired to safeguard the interests of the occupier during the period between the confirmation of a drainage scheme and the vesting of a holding, it could easily have done so.

In my opinion the question put to us should be answered in the negative.

Solicitor for the defendant (appellant): *E. Malachy Doris.*

Solicitors for the plaintiffs (respondents): *Simmons, Meglaughlin & Orr.*

J. D. C.

C.A.
1931.

June 11, 15.
July 9.

TODD v. MacCALLUM (1).

Workmen's Compensation—Employer and Workman—Employment—Accident arising out of and in the course of the employment—Sailor ashore for his own business—Fall from quay—Drowned either by stepping off the quay thinking he was stepping on to the gangway, or in an attempt to get from the place where he reached the quay edge to the gangway—Workmen's Compensation Act (Northern Ireland), 1927, (17 *&* 18 *Geo.* 5, *c.* 16) *s.* 1, *sub-s.* 1.

The chief engineer of a ship lying in harbour went ashore on leave on his own business. On returning to the ship in the evening, which was dark, he fell from the quay and was drowned. The Recorder found that he fell in either by stepping off the quay thinking that he was stepping on to the gangway, or in an attempt to get from the place where he reached the quay edge to the gangway, and Held, that the applicant was entitled to compensation.

Held, by the Court of Appeal (Andrews and Best, L.JJ.), that there was ample evidence to support the finding of the Recorder that the accident arose out of and in the course of the employment and that the chief engineer's widow was entitled to compensation.

An appeal by the respondents from an award made on 30th March, 1931, by the Recorder of Belfast, whereby he awarded compensation to the applicant in respect of the death of her husband.

The following statement of the facts is taken from the judgment of Best, L.J.

Isaac Todd was chief engineer of the S.S. " Ardglass," owned by the respondents which arrived at St. Malo on 15th December, 1930, about 3 p.m. Some time later, Todd, accompanied by the mate, Ernest H. Beaton, went ashore to buy postcards; they left by the gangway which consisted of three planks bolted with battens across and stanchions on both sides, and was placed almost in line with the funnel of the ship. There was an anchor light about three feet off the end of the gangway on the quay. The men returned about 8 p.m. Parallel to the quay and at a short distance therefrom a railway line ran along and a crane was placed across this line, two of the legs being within a couple of feet of the edge of the quay wall, the other two being beyond the railway line. The gangway was placed at a distance of from two to three feet from one of the legs of the crane. Close up to and partly under the crane there were waggons on the railway line and these were opposite to the end of the gangway.

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(1) In the Court of Appeal before Andrews and Best, L.JJ.

The mate and deceased approached the ship, which had her starboard to the quay, over some waste ground which was astern of the ship, deceased being fifteen to twenty feet in front. The mate passed between the trucks and the edge of the quay to the end of the gangway which he reached in safety. Deceased passed on the other side of the trucks and reached the edge of the quay at the leg of the crane which was about fifteen feet forward of the gangway. He fell in there and was drowned. The Recorder found that the light at the end of the gangway was obscured for the deceased, first by the trucks, and then by the legs of the crane, and that he fell in, either by stepping off the quay thinking that he was stepping on to the gangway, or in an attempt to get to the gangway from the place where he reached the quay edge. The night was very dark and the Recorder found that in the circumstances of the approach the gangway was not sufficiently lighted or marked for him and he concluded that when he fell in deceased was at the spot where he fell, because of his duty as chief engineer and not as a member of the public, and that he was endeavouring to avail himself of what he not unreasonably took to be the means of access from the shore to the ship. He was not, the Recorder found, in fact at the access because the darkness prevented him under the circumstances from seeing the end of the gangway, and he was misled as to where it actually was, but at the time he fell in he was trying to reach it.

The Recorder accordingly thought that the accident was caused by a reasonable attempt on the part of the deceased to get on to the gangway for the purpose of using it to return to the ship and he held that the accident arose out of and in the course of deceased's employment and made his award accordingly.

C.A.
1931.

TODD
v.
MACCALLUM.

Murphy, K.C., and *Warnock* for the appellants:—

We submit that the decided cases are in the appellants' favour and the applicant has nothing but dicta to rely on. As to dicta we rely on the words used by Farwell, L.J., in *Latham v. R. Johnson and Nephew, Limited* (1), where he said: "it is only the decision of the House" (the House of Lords) "that is binding, and no dicta of individual members of the House can alter the law or form any ground for extending the real decision beyond the established principles of the common law." In *Harries v. Crawfurd* (2), Lord Wrenbury said: "I must express my opinion that if a point does not arise for decision, particularly in this House" (the House of Lords) "it is not only not useful but it is mischievous to express an opinion upon it. As a judge, I myself often suffered from cases in which a superior court has from time to time expressed an opinion which was not a decision and therefore did not bind me as a judge, but which nevertheless out of respect to those of greater authority than myself, I could not but regard. To decide a point which does not arise, in my view is only mischievous."

As to the decided cases, we submit that *Kitchenham v. Owners of S.S. "Johannesburg"* (3) is a precise authority for the appellants' contention in the present case. The question which arises in this case has never been decided in favour of the applicant and we submit the decision of the Recorder is contrary to the decided cases. The decisions in *Kitchenham v. Owners of S.S. "Johannesburg"* (3) and *Charles R. Davidson & Company v. McRobb or Officer* (4) show the clear line of distinction drawn in the decided cases.

In *Kitchenham v. Owners of S.S. "Johannesburg"* (3), Fletcher Moulton, L.J., said in his judgment, "Thus, if the risk is one due to the means of access to the ship, as in *Moore v. Manchester Liners, Ltd.* (5), the accident is rightly said to arise out of his employment; but if the accident is shewn to arise from something not

(1) [1913] 1 K.B. 398, 408.
(2) [1919] A.C. 717,743.
(3) [1911] 1 K.B. 523, 527.
(4) [1918] A.C. 304.
(5) [1909] 1 K.B. 417; [1910] A.C. 498.

specificially connected with the ship it cannot be said to arise out of his employment. I do not think that the dividing line is when he actually touches the ship or the special means of access thereto. For instance, if it was shewn that when the sailor returned to the ship there was a dense fog and that in trying to find the gangway, which I will suppose was not lighted, he fell in the water and was drowned, I think that the accident would arise out of his employment. But if all that is shewn is that it occurred during his return to the ship but while he was still on the shore, and before he had taken any specific step towards getting on board the vessel, I think it would not thereby be established that the accident arose out of his employment."

The facts were very similar in *Kitchenham v. Owners of S.S. "Johannesburg"* (1), to those in the present case, and Fletcher Moulton, L.J., concluded his judgment by saying: "I am of opinion that the evidence in this case falls short of what is necessary, and though one may think it possible, and even probable, that he (the sailor) " was going on to the gangway when the accident occurred, this is not established with that reasonable certainty which the Court requires from a plaintiff in the proof of his case."

In *Charles R. Davidson & Company v. McRobb or Officer* (2), Lord Finlay, L.C., said: "If the ship is lying at a quay which forms part of a public highway by a river or estuary the sailor's employment for this purpose ceases when he has got off the gangway connecting the ship with the quay and it begins again on his return when he reaches the shore end of the gangway."

In the same case Lord Dunedin expressed his disagreement with the view that had previously been expressed that a sailor's employment was continuous, and that when he had gone ashore on leave and had a fatal accident, he perished in the course of his employment.

We rely on the words used by Lord Dunedin in a later part of his judgment in *Charles R. Davidson &*

(1) [1911] 1 K.B. 523. (2) [1918] A.C. 304, 310, 320.

Company v. McRobb or Officer (1), where he said : "The upshot of it is that there is no case where liability has been found in which the accident has occurred at any place other than what may be termed the provided access to the ship."

We submit that if the view expressed by Lord Dunedin is the correct result of the authorities, the contention of the appellants is clearly correct in law. The pronouncement of Lord Dunedin seems to be precisely in point.

In the present case we strongly contend that the accident arose neither in the course of the employment, nor out of the employment.

Wilson v. Lyle (2) should not in our view be followed.

Robertson v. Owners of S.S. "*Appalachee*" (3) seems to have some bearing on the present case. In that case sailors who were on shore on leave from their ship which lay in the river, in order to return to the ship got into the first boat handy, which proved to be unseaworthy and sank, and some of them were drowned. They were under no obligation to return by this or any particular boat, but they were under an obligation to return to their ship by a stated time, and in fact a launch had been provided by which they could, if they wished, have returned.

It was held, that the sailors being under no obligation or duty to their employers to return by this boat, were not in the course of their employment in so doing, and therefore the accident did not arise in the course of such employment. Although the facts of *Black v. Owners of S.S.* "*Hesperides*" (4) are different from those existing in the present case, we submit that the same principle is applicable.

There is no evidence to support the Recorder's finding of fact as to how the applicant fell into the water. The applicant's employment was interrupted when he went ashore. We submit that he would resume his employment at the point at which he left it off. The applicant had not resumed his employment when he got back to the docks. In no fair sense could

(1) [1918] A.C. 304, 322.
(2) 18 B.W.C.C. 731.
(3) 20 B.W.C.C. 57.
(4) 22 B.W.C.C. 295.

the point at which he had arrived be termed a provided access to the ship. There is no evidence in support of the Recorder's finding that the applicant was seeking to avail himself of what he not unreasonably took to be the means of access from shore to ship.

Fox, for the applicant :—

If the accident arose in the course of the employment, it must have arisen out of the employment.

The following propositions of law are to be deduced from the authorities :—(*a*) it is the duty of a seaman in the position of the deceased to return to his ship ; (*b*) it is the duty of the employer to provide facilities to enable the seaman to return to his ship ; (*c*) when a seaman runs a risk while using, or making a reasonable attempt to use the facilities provided for return to his ship, such risk is incidental to his employment and accordingly arises in the course of his employment, in other words there is a causal connection between the risk run and the employment. I submit that the risk run was encountered by the deceased because he was attempting to get aboard his ship. It was not a risk equally run by members of the public. This question at issue was decided by the Recorder, and if there is any reasonable evidence to support his finding of fact and he has applied the proper legal principles, such finding will not be disturbed. There is no rigid rule that the seaman must have reached the ship or the means of access to the ship. The means of access provided by the employer consisted of a gangway with a light. The Recorder has found that the light was insufficient, as it was obscured. The means of access provided were defective. There is no evidence that the deceased ought to have followed a certain route. It must be remembered that it was a very dark night, and there was no proper light. I rely on the words used by Fletcher Moulton, L.J., in *Kitchenham v. Owners of S.S. "Johannesburg"* (1), where he said : "The return to the ship is in the course of his employment, but the risks do not become risks arising out of his employment until he has to do something specifically connected with his employment on the ship." In a later portion of his judgment in this case Fletcher Moulton, L.J., said : "If it was shewn that when the sailor returned to the ship there was a dense fog and that in trying to find the gangway, which I will suppose was not lighted, he fell in the water and was drowned, I think that the accident would arise out of his employment."

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(1) [1911] 1 K.B. 523, 527.

The test to be applied, on which side of the dividing line the case falls, was for the Recorder.

The employment does not come to an end at the moment when the seaman has taken his foot off the ship.

I submit that the inference arrived at by the Recorder is binding, if such inference was reasonable on the facts found.

I submit that *Kitchenham v. Owners of S.S. "Johannesburg"* (1) is an authority in the applicant's favour.

I rely strongly on *Wilson v. Lyle* (2), which is very similar to the present case. There, the workman, an engineer was returning to his ship to attend to the boilers on a dark night. He mistook the gangway to the tier of boats next to his proper tier for his own gangway and fell therefrom and was drowned.

It was held that the accident arose out of and in the course of the employment.

In that case the Lord Justice Clerk (Lord Alness) said : "The question is not where was the claimant when an accident befell him, but was the claimant, when he was injured, doing something which is part of, or incidental to his service with his employer. Was he doing something which was part of his service to his employer ? Would he have done what he was doing apart from that employment ? If he would not, it is difficult to see that he was not then acting in the course of his employment."

Sankey, L.J., in his judgment in *Morrison v. Owners of S.S. "Aboukir"* (3), referred to the deceased in

(1) [1911] 1 K.B. 523.
(2) 18 B.W.C.C. 731.
(3) 21 B.W.C.C. 163, 173.

that case who had got into a canoe in order to return to his ship, and was drowned, as not being within the Act " until he got therefore, to the point where he had to do something other than what would be done as a passenger in the boat."

Wilson v. Lyle (1) was approved of by Atkin, L.J., in *Robertson v. Owners of S.S.* " *Appalachee* " (2). It is referred to by Lord Hanworth, M.R., in *Black v. Owners of S.S.* " *Hesperides* " (3) evidently on the basis that it was rightly decided.

In *Kearon v. Kearon* (4), a seaman " sustained an injury in trying to effect the *bona fide* purpose of returning to the vessel which it was his duty to reach."

The Court of Appeal in Ireland consisting of Walker, L.C., Holmes and Cherry, L.JJ., held that the accident arose out of and in the course of the employment.

I rely on the words used by Lord Tomlin in *Simpson v. London Midland and Scottish Railway Company* (5).

I contend that in the present case the accident was reasonably referable to the deceased's endeavour to resume his employment on board his ship.

Consideration must be given to the fact that there was danger surrounding the particular area in which the accident happened. The Recorder was justified in holding that the accident arose not only in the course of the employment, but out of the employment.

He also referred to *Webber v. Wansborough Paper Co., Ltd.* (6), *Parker v. Ship Black Rock Owners* (7), *Cook v. S.S.* " *Montreal* " (*Owners of*) (8), and *Stewart & Son, Ltd., v. Longhurst* (9).

Warnock (in reply) :—

Interruption of the employment continues until the workman returns to his employment. *Moore v. Manchester Liners, Limited* (10), is quite different from the present case. In that case while climbing a ladder

(1) 18 B.W.C.C. 731.
(2) 20 B.W.C.C. 57, 70.
(3) 22 B.W.C.C. 295, 305.
(4) 45 I.L.T.R. 96.
(5) [1931] A.C. 351,
(6) [1915] A.C. 51.
(7) [1915] A.C. 725.
(8) 6 B.W.C.C. 220.
(9) [1917] A.C. 249.
(10) [1910] A.C. 498.

insecurely fixed between the quay and the ship, but providing the only means of communication, a seaman fell into the water and was drowned. The principle upon which that case was decided was that the ladder formed part of the ship. We rely on the words used by Fletcher Moulton, L.J., in *Kitchenham v. Owners of S.S.* "*Johannesburg*" (1), where he said: "If all that is shewn is that it (the accident) occurred during his return to the ship but while he was still on the shore, and before he had taken any specific step towards getting on board the vessel, I think that it would not thereby be established that the accident arose out of his employment." In the present case no specific step had been taken when the accident happened.

We rely on the words used by Lord Parker of Woddington and Lord Sumner, in *Parker v. Ship Black Rock* (*Owners*) (2).

An accident cannot arise out of a man's employment unless it arises in the course of his employment.

Wilson v. Lyle (3) was decided entirely on the dicta of Fletcher Moulton, L.J., and we do not hesitate to say that it was wrongly decided.

July 9.

ANDREWS, L.J.

ANDREWS, L.J.: This is an appeal from an award of the Recorder of Belfast made on the hearing of an arbitration for compensation under the Workmen's Compensation Acts. The applicant is the widow of one Isaac Todd, who was Chief Engineer in the S.S. "Ardglass," and who lost his life by drowning in St. Malo Harbour, on 15th December, 1930. The only evidence in regard to the accident which was given at the hearing was that of Patrick Duffin, fireman, who was called on behalf of the applicant, and of Ernest H. Beaton, the mate, who gave evidence on behalf of the respondents. The material discrepancies in their evidence were few, and these have been ruled upon by the learned Recorder; so the relevant facts may be briefly stated.

On the evening of the accident Todd and Beaton went ashore together on their own business—to buy

(1) [1911] 1 K.B. 523.

(2) [1915] A.C. 725, 730, 731.

(3) 18 B.W.C.C. 731.

postcards. It is admitted that they had leave to do so. It was a very dark night. They left the ship by a gangway which consisted of three planks bolted together, with battens across and stanchions on both sides. The only light provided consisted of an anchor light which had been placed on the quay about two feet from the end of the gangway ; the two men were returning together to the ship about 8 p.m. when the accident occurred. They had crossed a piece of waste ground astern of the ship and came to the quay. Upon it were two railway coal trucks and a crane. The trucks were opposite the gangway and only a few feet from it ; and the crane, which was about twelve feet square and forward of the gangway, had four legs, two of which were close to the quay side and one of which was only two or three feet from the gangway. It was so dark that Beaton walking about fifteen or twenty feet behind Todd could not see him. When Beaton got to the gangway, which he reached by walking between the trucks and the edge of the quay, he heard a splash, and Todd was seen lying in the water at a point which, according to Duffin, was "nearly below the gangway," or, according to Beaton, was "fully fifteen feet forward of the gangway." All efforts to rescue him failed, and he was drowned. Although in the dark Beaton could not definitely see the course that Todd had taken, he said that he must have gone on the shore side of the trucks, and the learned Recorder so finds. He further finds that the deceased came to the edge of the quay at the leg of the crane furthermost from the gangway (*i.e.*, about fifteen feet from it) and that he fell in there ; that the light at the end of the gangway was obscured for him first by the trucks and subsequently by the legs of the crane ; and that he fell in either by stepping off the quay thinking that he was stepping on to the gangway, or in an attempt to get from the place where he reached the quay edge to the gangway. The Recorder also held that, owing to the night being very dark and under the circumstances of Todd's approach, the gangway was not sufficiently lighted or marked for him. Upon the whole evidence the Recorder concluded that the deceased was at the spot where he fell in because of his duty as chief engineer and not as a member of the public, and was endeavouring to avail himself of what he not unreasonably took to be the means of access from the shore to the ship; that he was not in fact at the access because the darkness prevented him under the circumstances from seeing it; that he was misled as to where it actually was, but at the time he fell in he was trying to reach it. Accordingly, the Recorder was of opinion that the accident was caused by a reasonable attempt to get on the gangway for the purpose of using it, and, so, held that the accident arose out of and in the course of his employment.

In so far as the findings of the learned Recorder are based on direct evidence it has not been argued that they are not fully justified by that evidence. Further, the right of an arbitrator under the Act to draw inferences resting upon those facts, as distinguished from conjecture unsupported by any facts, has not been and could not be questioned, *Bates v. Mirfield Coal Co.* (1), and *Kerr or Lendrum v. Ayr Steam Shipping Co.* (2); and in my opinion such inferences of fact as the learned Recorder has drawn in the absence of direct evidence are not only amply justified, but are in every respect precisely the inferences which I would myself have drawn. They are the natural inferences, and, indeed, almost inevitable. It only remains, therefore, to consider the legal effect of those findings.

The sole question to be determined is whether the accident to Todd which resulted in his death arose out of and in the course of his employment. The question has been held to be one of fact for the arbitrator, and the Court of Appeal will only interfere with the finding if the arbitrator has misdirected himself in point of law, or if there be no evidence to support it. As Lord Haldane expressed it in *Davidson & Co. v. McRobb or Officer* (3), the House of Lords have resolutely declined to interfere with the decisions of arbitrators unless either on the face of them they disclose error in law, or conclusions of fact have been arrived at without any evidence to warrant them. At the same time it is doubtful if any words in any Act of Parliament have been productive of more litigation or have more frequently received judicial interpretation, as the double condition which they impose is the chief limitation or restriction which the Act provides upon the right to compensation. The expressions "arising out of the employment" and "in the course of the employment" unquestionably to some extent overlap each other, yet they are by no means synonymous. Briefly expressed, an accident arises out of a man's employment when it has resulted from some risk, incident to the duties of his service—a risk to which, it is reasonable to say, he would not have been exposed but for such service. The words imply causality. On the other hand, an accident only arises in the course of a man's employment if it occurs while the workman is doing something which he is employed to do. And so, as Lord Parmoor put it in *Davidson v. McRobb or Officer* (1), the directions which an arbitrator should give himself in these cases is whether at the time of the accident the deceased was engaged in the duty or business of his employment, and whether, if he was so engaged, there was some form of causal relationship between such duty or business and the accident. The time and place at which the accident occurred are important but by no means conclusive factors in arriving at an answer to this question.

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(1) 6 B.W.C.C. 165.

(2) [1915] A.C. 217.

(3) [1918] A.C. 304, 316.

In some of the earlier cases such as *Moore's Case* (2) and *Kitchenham's Case* (3), the view was expressed, particularly by Lord Moulton and Earl Loreburn, that when a ship is in port and a sailor goes on shore with leave his employment is not interrupted thereby; and that, as his engagement is continuous, such a man is in the course of his employment if the accident happen at any place where he may reasonably be at the time. This view has been expressly disapproved of in *Davidson v. McRobb or Officer* (1), and must now be definitely rejected. Such a man's employment is temporarily suspended; and an accident occurring at such a time cannot be said to arise out of and in the course of his employment.

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(1) [1918] A.C. 304, 334.
(2) [1910] A.C. 498.
(3) [1911] 1 K.B. 523; [1911] A.C. 417.

But a time arises when the interruption in the man's employment ceases and his service is resumed. This time has certainly arrived when he has returned to and got on board his ship. But the cases in my opinion properly go further and establish that liability for an accident attaches when it occurs at what Lord Dunedin calls in *Davidson v. McRobb or Officer* (1), " the provided access to the ship." He interprets these words on the next page of his speech when he says : "If, therefore, " the place at which the accident happened was in any " fair sense the access to the ship, then the accident " would be in the course of his employment." Lord Haldane in the same case indicated that liability would attach when the employee had reached the ship or the ladders by which the ship was to be boarded, for he might properly be taken to have been directed to use them as being part of the vessel on which he was living as an incident of his employment. At the same time he held that a quay by which a man approaches his ship is not a place for which his employers have any responsibility. Lord Atkinson's test was whether the man had done or attempted to do anything specially connected with his employment on the ship; and finally, in his dissenting speech, Lord Finlay, L.C., said that the employer would be liable if the accident happened after the sailor on his way back had got on to the gangway and also if he was close to the shore end of the gangway but in the darkness or fog failed to get upon it and fell into the water.

I feel, however, that we must examine the cases a little more closely before we can state with any confidence whether it is necessary for the establishment of liability that the sailor should actually touch the ship or the special means of access thereto. Fletcher Moulton, L.J., in *Kitchenham's Case* (2), clearly answered this question in the negative, and expressed the opinion that if a sailor met with an accident whilst

(1) [1918] A.C. 304, 322. (2) [1911] 1 K.B. 523, 527.

returning to his ship and trying to find the gangway in a dense fog, the accident would arise out of his employment. I would hesitate to rely upon this dictum, if it were unsupported, as other portions of the judgment of the Lord Justice in that case have, as I have already stated, been disapproved of ; but I think such support is not wanting. Neither Lord Haldane nor Lord Dunedin, in the passages which I have cited, has in terms insisted upon actual touch or contact with the ship or its means of access as a condition precedent to the establishment of liability. Indeed, Lord Dunedin's words that the place should be *in a fair sense* the access to the ship are clearly opposed to a necessity for actual touch. Perhaps even stronger words are to be found in the speeches of Lord Parker and Lord Sumner in *Parker v. Owners S.S.* "*Blackrock*" (1) the latter of whom speaks of the man having "so "nearly approached the means of access to the ship "as to make it reasonable to hold that he has returned "to the sphere in which his employment operates." It is, however, only fair to say that Mr. Warnock, who argued this case so ably for the appellants, pressed with such judicial utterances, admitted that actual physical contact was not necessary, but he submitted that the sailor must be within reach by foot or hand of the ship or its provided access. Then and then only could he be said "in a fair sense" to have reached the access to the ship.

On the one hand, I am pressed with the impossibility, if not the absurdity, of determining these cases by inches ; for, not only would this be a variable standard dependent upon the size of the individual, but it would be establishing just that sort of criterion or test upon which, from the nature of such accidents, occurring as they so frequently do in darkness or fog or in the absence of any eye-witness, no precise or definite direct evidence would be available. On the other hand, I am not insensible to the danger of unduly extending liability for such accidents to points more remote from the ship, and also to the difficulty of drawing any line when once the ship and the gangway

(1) [1915] A.C. 725.

have been left. But it seems to me that the true line of demarcation—the true dividing line between liability and non-liability—ought to be found not in the lineal standard of yards, feet or inches, but in principle; and this principle I find expressed in a manner which precisely accords with my own view in the recent Scotch case of *Wilson v. Lyle* (1), an authority which, on its facts, more closely resembles the present than any of the other cases which were cited before us.

A ship's engineer, who was returning to his ship on a dark night for the purpose of attending to the boilers, mistook the gangway to the tier of boats next to his proper tier for his own gangway, and fell therefrom and was drowned. The Court of Session held that the accident arose out of and in the course of his employment. Without citing *in extenso* any passages (except one) from the judgments, I may say that the case emphasises the importance of the existence of causal connection between the risk run and the employment, as this differentiates the accident resulting from such risk from one which might occur to any member of the public. The test is not "locality" or "control" but "causality"; the question is not "where was" the seaman at the time of the accident but "why was he where he was." In the present case, just as much as in *Wilson v. Lyle* (1), it may be said that the man who lost his life was returning to his ship in his employer's interest, not for any purpose of his own. The risk of his mistaking the ladder (or the position of the gangway) by which he had to obtain access to his vessel and the risk of his falling therefrom were dangers which he would not have had to encounter but for his employment. They were risks not unconnected with the access to the boat. The deceased was at the time of the accident at the place where he was killed in pursuance of his duties as ship's engineer. He was doing something, which, if not part of, was incidental to his service with his employers—something which he would not have done apart from that employment. There has been neither evidence nor suggestion that he would have been at the point on the quay from

(1) 18 B.W.C.C. 731.

which he fell into the harbour had it not been for his employment.

The passage of the judgments to which I have referred is taken from the judgment of the Lord Justice-Clerk (Alness) who, at p. 750, says: "The problem appears "to be as narrow as this. A seaman is admittedly "in the course of his employment if he has reached the "provided access to the ship when his accident occurs. "If he has not done so, but by reason of an excusable "error, thinks that he has done so, is there any reason "in principle why his claim should be excluded? I "can see none. The extension of liability so in-"volved—if, indeed, it be an extension—is not "irrational and unlimited . . . , but is reasonable and defined."

The case of *Wilson v. Lyle* (1) has been referred to in subsequent cases and always with approval. Thus in *Robertson v. Owners of S.S. "Appalachee"* (2), Atkin, L.J., after referring to the cases as having decided that when a man reaches the access or the *fair means of access* to his ship, he will have reached that sphere where his employment operates, goes on to speak of *Wilson v. Lyle* (1) as having established that a man had reached the sphere of his employment when he had made a mistake as to the access to his ship, and concludes by stating that: "Indeed that seems to be "essential, as I think, to giving the full complement "to the incident of a man's employment." Again Lord Hanworth, M.R., refers to *Wilson v. Lyle* (1) in *Black v. Owners of S.S. "Hesperides"* (3), without any suggestion of disapproval, and in fact, as I read his judgment, he upholds it on the ground that the man "had reached his place of employment and that the "only reason why he had got to the point at which "he had got was for the purpose of carrying out his "duty, and that if he had not been doing so he would "not have been at that place nor have incurred the "risk which he did." I can only say that if Wilson had reached his place of employment when he was at the gangway to the next tier of boats to his own, it surely must likewise be admitted that Todd had also reached his place of employment when, within fifteen feet of the gangway to his ship, he fell into the water from the quay, either thinking he was stepping on to the gangway or attempting to get to it from the place where he reached the quay edge. Finally, in *Morrison v. Owners of S.S.* "*Aboukir*" and *Woods v. Same* (1), the employers were held liable for the loss of a ship's carpenter and seaman who were drowned by the capsizing of a canoe in which they were paddling across the wharf to their ship. In these cases *Wilson v. Lyle* (2) was not cited; and, accordingly, it was by an independent train of reasoning that an English Court of Appeal (consisting of Hanworth, M.R., Sankey and Russell, L.JJ.) held that it was not essential that the canoe should be within actual reach of the gangway at the time that the accident occurred; it was sufficient that it was "almost within reach," and that one of the men had by rising from his seat taken a "specific step" towards getting on board the ship, *i.e.*, had done something specifically connected with his employment on the ship.

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(1) 18 B.W.C.C. 731.
(2) 20 B.W.C.C. 57.
(3) 22 B.W.C.C. 295, 305.

I shall not prolong this judgment by reference to further authority where the facts are not as similar to those of the present case as in the cases which I have cited, though passages in the speeches delivered in *Fisher or Simpson v. L. M. & S. Railway Co.* (3), in which the law applicable to "unexplained accident cases" was fully expounded, will be found of considerable assistance to the present applicant. In my opinion there was ample evidence to support the findings of the learned Recorder, and his award was in full accord with the settled principles of recognised authority. At the time that Todd fell into the water he had come within the sphere or ambit of his employment. He was trying to reach the gangway, and was making a reasonable attempt to get on it for the purpose of using it as the provided access to his ship. He was, therefore, engaged in doing something specifically connected with his employment on the ship.

(1) 21 B.W.C.C. 163.

(2) 18 B.W.C.C. 731.

(3) [1931] A.C. 351.

In these circumstances the award of the Recorder should not in my opinion be disturbed, and the appeal will accordingly be dismissed with costs.

Best, L.J. : This is an application by the respondents for an order that the award made in this matter on the 30th day of March, 1931, by His Honour the Recorder of Belfast whereby he awarded compensation to the applicant in respect of the death of her husband Isaac Todd, be set aside on the ground that the learned Recorder was wrong in point of law and misdirected himself in holding that the death of the said Isaac Todd took place from injury caused to him by accident arising out of and in the course of his employment as a workman employed by said respondents, and on the ground that there was no evidence upon which the learned Recorder could so find.

Isaac Todd was chief engineer of the S.S. "Ardglass," owned by the respondents, which arrived at St. Malo, on Monday, 15th December, 1930, about 3 p.m. Some time later, Todd, accompanied by the mate, Ernest H. Beaton, went ashore to buy postcards, they left by the gangway which consisted of three planks bolted with battens across and stanchions on both sides, and was placed almost in line with the funnel of the ship. There was an anchor light about three feet off the end of the gangway on the quay. The men returned about 8 p.m. Parallel to the quay and at a short distance therefrom a railway line ran along and a crane was placed across this line, two of the legs being within a couple of feet of the edge of the quay wall, the other two being beyond the railway line. The gangway was placed at a distance of from two to three feet from one of the legs of the crane. Close up to and partly under the crane there were waggons on the railway line and these were opposite to the end of the gangway.

The mate and deceased approached the ship, which had her starboard to the quay, over some waste ground which was astern of the ship, deceased being fifteen to twenty feet in front. The mate passed between the trucks and the edge of the quay to the end of the gangway which he reached in safety. Deceased passed on the other side of the trucks and reached the edge of the quay at the leg of the crane which was about fifteen feet forward of the gangway. He fell in there and was drowned. The learned Recorder has found that the light at the end of the gangway was obscured for the deceased first by the trucks and then by the legs of the crane, and that he fell in, either by stepping off the quay thinking that be was stepping on to the gangway, or in an attempt to get to the gangway from the place where he reached the quay edge. The night was very dark and the learned Recorder finds that in the circumstances of his approach the gangway was not sufficiently lighted or marked for him, and he concluded that when he fell in, deceased was at the spot where he fell, because of his duty as chief engineer and not as a member of the public, and that he was endeavouring to avail himself of what he not unreasonably took to be the means of access from the shore to the ship. He was not in fact at the access because the darkness prevented him under the circumstances from seeing the end of the gangway and he was misled as to where it actually was, but at the time he fell in he was trying to reach it.

The learned Recorder accordingly thought that the accident was caused by a reasonable attempt on the part of the deceased to get on the gangway for the purpose of using it to return to the ship and he held that the accident arose out of and in the course of deceased's employment and made his award accordingly.

Was the learned Recorder right in arriving at the conclusion that the accident to the deceased arose out of and in the course of his employment ? The question is one of fact to be determined by the arbitrator, and his finding cannot be disturbed unless the arbitrator has misdirected himself in point of law or unless there is no evidence to support his finding. The notice of appeal and the arguments advanced by the respondents attack the award on both grounds.

In the case of *Davidson v. McRobb or Officer* (1), Lord Dunedin points out that for an accident to arise out

(1) [1918] A.C. 304, 320.

of a man's employment "it must be a risk incidental to the employment," and at p. 321 he says: "It is "obvious that the addition of the words 'and in the "course of' are meant in some way either to qualify "or further explain the words 'out of,' and his view "is that they do the latter." Further he says: "It is "in one sense difficult to imagine that there could be "any injury held as arising out of the employment "which would not also be in the course of the em"ployment. But it may well be that the determina"tion of the question whether at the moment of the "injury the workman was in the course of his em"ployment may go to solve the question of whether "the injury arose out of the employment," and by way of illustration he discusses the case of a domestic servant being run over in the public street, and he arrives at the conclusion that "in the course of employment" is a different thing from "during the period of employment." It connotes the idea that the workman or servant is doing something which is part of his service to his employer or master. Holding these views as to the meaning of the Act he disagrees with the dictum of Lord Moulton (then Fletcher Moulton, L.J.) who, speaking in *Kitchenham's Case* (1), of the judgment of the House of Lords in *Moore's Case* (2), said: "I consider it, therefore, to be settled "that when a ship is in port and a sailor goes on shore "with leave his employment is not interrupted "thereby." Nor does he agree with the dictum of Earl Loreburn in the case of *Moore* (2) to the effect that in the case of a continuous engagement a man is in the course of his employment if the accident happen at any place where he may reasonably be at the time.

The view, therefore, that the employment of a man who goes ashore on his own business but with leave is not thereby interrupted cannot now be regarded as law and the question arises in this case as to the point of time when the interruption to deceased's employment ceased. Had the interruption ceased or had the employment which was temporarily suspended been resumed when the engineer fell into the water? If it had, the accident arose out of and in the course of deceased's employment. No difficulty would arise if deceased had reached or been actually on the gangway when the accident occurred but the cases in the books show that the liability of the employer for an accident attaches when the accident occurs at what has been called "the provided access to the ship."

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(1) [1911] 1 K.B. 523, 526.

(2) [1910] A.C. 498.

Lord Dunedin in the case already cited, *Davidson v. McRobb* (1), says that he has read the opinion about to be delivered by Lord Atkinson and concurs in his view arrived at as the result of the examination of all the cases decided as to sailors going from or returning to their ship. "The upshot of it is," he says, "that there is no case where liability has been found "in which the accident has occurred at any place "other than what may be termed the provided access "to the ship. If an accident occurs there it may well "be, and I agree it is involved in the decisions, that "when a sailor is leaving his ship by the provided "access, or has reached the provided access on his "return, he has not left the course of his employment "in the first case—in the second he has returned to it. "And obviously, if the provided access is defective, "as was the case in *Moore's Case* (2), it is easy to come "to the conclusion that the accident arose out of the "employment." Lord Atkinson, at p. 330 of the report in *Davidson v. McRobb* (3) says: "In the face of "these authorities it is, I think, impossible to hold "that the risk to which the deceased in the present "case was exposed as he walked along these quays "had, before the accident, changed from that to "which an ordinary wayfarer on the pier would be "exposed to that to which the deceased became "exposed by virtue of his being a member of the crew "of his ship. The risks to which he was exposed, "therefore, did not arise out of his employment, since "he had not up to the time of the accident done or "attempted to do anything specially connected with "his employment on the ship. His employment was "not, I think, to any extent the cause of the accident, "proximate or remote."

(1) [1918] A.C. 304, 322. (2) [1910] A.C. 498. (3) [1918] A.C. 304, 330

The question then arises: Had the deceased in the present case done anything or attempted to do anything specially connected with his employment on the ship? If the test be that before resuming his employment he must have actually reached the provided means of access, in this case, the gangway, the answer should be in the negative. But I think this is to put too narrow a construction on the words here used by Lord Atkinson, and it is to be noted that Lord Dunedin says in the same case at p. 323 that if "the place at which the accident happened was in any "fair sense the access to the ship, then the accident "would be in the course of" the workman's employment.

The engineer and the mate were returning to the ship, they had come to the waste ground which appears to have been the direct way of approach thereto, the darkness was such that the mate, who was distant from fifteen to twenty feet behind Todd, was unable to see him or to see what course he took. He is convinced, however, that Todd must have gone on the farther or land side of the railway, and the Recorder has so found. If the trucks had not been opposite to the end of the gangway near which the light was placed, it would probably have been as easy for Todd to reach the gangway as it was for the mate, but his view of the light was obscured by the trucks and these latter obstructed his passage towards the lamp and gangway. It appears to me that deceased, though in the immediate neighbourhood of the end of the gangway, was unable to reach it, first by the obstacle of the trucks and next by that of the crane, but that he was attempting to do something specially connected with his employment, viz., to reach the end of the gangway from which in fact he was separated by but a few feet and was in the act of groping for it when he fell into the water. If these be reasonable inferences from the facts proved, as I think they are, the result arrived at by the learned Recorder is, in my opinion, right.

Having arrived at this conclusion, it is unnecessary to examine the other cases cited during the argument, especially as this has been done very fully by my colleague.

I agree that the appeal must be dismissed with costs.

Solicitors for the applicant: *C. & H. Jefferson.*
Solicitors for the respondents: *McKinty & Wright.*

J. McC.

FERMANAGH COUNTY COUNCIL v. PARKER (1).

C.A.
1931.

June 24, 30.

Summary Jurisdiction—Jurisdiction of County Court—Right of County Council to sue for expenses, incurred by them under the Drainage Acts, as a debt in County Court—Right to sue in a summary manner expressly given by statute—Drainage Act (*Northern Ireland*), 1929 (20 *Geo.* 5, *c.* 20), *s.* 22.

The plaintiffs sued the defendant in the County Court for the amount of expenses incurred in scouring out and cleansing a watercourse through the defendant's lands, and they determined that the amount of such expenses should be a debt due to them by the defendant.

This amount sued for was claimed to be due under the provisions of section 22, sub-section 2, of the Drainage Act (Northern Ireland) 1929, which provides *inter alia* that the whole or any part of the expenses incurred by the county council in executing such works as are necessary for causing a watercourse on any agricultural lands to be scoured out and cleansed, shall, if they so determine, be a debt due to the county council by the person upon whom a notice has been served, requiring him to scour out and cleanse such watercourse, and be recoverable from him in a summary manner.

The matter came before the County Court Judge by way of civil bill. The County Court Judge held that section 22 of the Drainage Act (Northern Ireland), 1929, created a new right in the County Council and prescribed the remedy for enforcing it, and that this was the only remedy open to the plaintiffs. He accordingly dismissed the civil bill. The plaintiffs appealed to the Judge of Assize who stated a case on the point for the opinion of the Court of Appeal.

Held, by the Court of Appeal (Best, L.J. and Wilson, J., dissentiente Moore, L.C.J.) that the expenses claimed are expenses recoverable only under the statute, and the debt is not a debt due by common law, but is a statutory debt. It followed that this new statutory liability and debt could only be recoverable in a summary manner as provided by the statute which created it.

CASE STATED on the hearing of a civil bill appeal, for the opinion of His Majesty's Court of Appeal in Northern Ireland by Andrews, L.J., at the County of Fermanagh Spring Assizes, 1931, as follows:—

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(1) In the Court of Appeal before Moore, L.C.J., Best, L.J., and Wilson, J. The case had previously been argued before Moore, L.C.J., and Best, L.J., but their Lordships directed it to be argued before a full Court.

This case came before me by civil bill at the Spring Assizes for the County of Fermanagh. The plaintiffs sued for the sum of Four Pounds two shillings and nine pence, being the amount of expenses incurred by them in scouring out and cleansing in a proper manner a certain watercourse or drain on or through the defendant's agricultural holding situate at Glencunny and Clonamullog in the Division of Enniskillen and County of Fermanagh, being the watercourse from Bodarra Little to Sillies River near Glencunny bridge, and which watercourse the defendant was liable by prescription or otherwise to scour out and cleanse, and failed to do so after having been required so to do by the plaintiffs by notice in writing served by the plaintiffs upon the defendant on the 7th May, 1930, and the plaintiffs having duly determined that the amount of such expenses should be a debt due to the plaintiffs by the defendant.

The amount sued for was claimed to be due under the provisions of section 22 of the Drainage Act (Northern Ireland) 1929, which was substituted for section 12 of the Drainage Act (Northern Ireland), 1925. It was admitted that the requisite notice under section 22 of the Act of 1929 had been served, that the work done by the plaintiffs in scouring out and cleansing the watercourse had been reasonably necessary, and that the amount sued for was, accordingly, due and payable by the defendant to the plaintiffs. The only question in dispute before me was whether the sum could be recovered by the plaintiffs by way of civil bill in the County Court or only by proceedings before the magistrates at petty sessions. The material words of section 22 of the Act of 1929 are that :—" The whole or any part of the " expenses incurred by the county council in executing " such works shall, if they so determine, be a debt " due to the county council by the said person, and " be recoverable from him in a summary manner."

J. C. Davison, K.C., for the defendant, submitted that as the section created a new statutory right and provided the remedy for enforcing it, this was the only remedy open to the plaintiffs. He referred to *Barraclough v. Brown & Others* (1), to section 5 of *The Fines Act (Ireland)* 1851 *Amendment Act*, 1874, and to *Mayne on Damages*, 9th Edit. p. 491.

Mr. Murphy, for the plaintiffs, did not dispute the general proposition that if there be no pre-existing obligation and if a statute which creates it also provides a specific remedy, that remedy must be adopted. He contended, however, that the statute enabled the county council to determine (as they admittedly had done) that the expenses incurred by them were a "debt due" to the plaintiffs, and he relied upon the words of Lord Herschell in *Barraclough's case* (at p. 619) (1), which, he submitted, distinguished that case from the present, and made it an authority in his favour, as Lord Herschell had decided that case against the plaintiffs on the ground that no words were to be found in the enactment which he had under consideration constituting the expenses incurred a debt due from the owners of the vessel. Mr. Murphy contended that as the expenses incurred in the present case were by the plaintiffs determined to be a debt due to them, all common law remedies for debt were open to the plaintiffs and the statutory remedy was merely additional to such other remedies. He also referred to the judgments of Parke, B., in *Shepherd v. Hills* (2), and of Scrutton, L.J., in *Cohen v. Hall* (3).

As the question appeared to me to be of some public importance, I agreed to state a case for the opinion of the Court of Appeal.

The question to be determined is whether the sum of Four Pounds two shillings and nine pence sued for is legally recoverable by civil bill in the County Court.

If the answer to this question be in the affirmative, the D.W.P. granted by the learned County Court Judge will be reversed and a decree given for Four Pounds two shillings and nine pence with One Pound eleven shillings costs in the County Court and Two Pounds fifteen shillings and six pence costs on Appeal. If the question be answered in the negative, the D.W.P. will be affirmed with Eighteen shillings costs and One

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(1) [1897] A.C. 615.

(2) 11 Ex. 55.

(3) [1922] 2 K.B. 41.

Pound one shilling witnesses expenses in the County Court, and Two Pounds four shillings and ninepence costs and Four Pounds four shillings witnesses expenses.

Murphy, K.C., and *Johnson* for the plaintiffs :—

The point at issue is whether the county council is entitled to recover in the County Court certain expenses incurred under section 22 of the Drainage Act (Northern Ireland), 1929. The question is, can such expenses be treated as an ordinary debt for the recovery of which proceedings can be taken in the County Court or High Court, or can proceedings only be taken to recover the amount before Justices.

In *Doe v. Bridges* (1), Lord Tenterden, C.J., who delivered the judgment of the Court, said : "Where "an Act creates an obligation, and enforces the per- "formance in a specified manner, we take it to be a "general rule that performance cannot be enforced "in any other manner."

There is a multitude of cases deciding that where an obligation is created *de novo*, the method prescribed for the enforcement of that obligation and no other method must be followed. That, however, is quite different from the present case. Here, there is a statute enabling the county council to create a debt, once the county council has done this, it is not limited to any one method of recovery. it has all the ordinary remedies. The statute merely provides that the county council can recover their debt in a summary manner.

Barraclough v. Brown (2), is, we submit an authority for the proposition for which we contend. The precise point is put by Lord Herschell in his speech in *Barraclough v. Brown* (2).

The words in the statute are "and be recoverable "from him in a summary manner," not shall only be recoverable by summary proceedings. "Recoverable" is obviously not mandatory.

In *West v. Downman* (3), Cotton, L.J., said : "If "the previous Act had made the claim a debt and only

(1) B. & Ad. 847, 859.
(2) [1897] A.C. 615, 619.
(3) 14 Ch.D. 111, 121.

"given an additional remedy by summary proceedings "before justices, this enactment would have been "unnecessary (the enactment being the Local Govern- "ment Amendment Act, 1861, s. 24) for the sum "would already have been recoverable in a County "Court."

We rely on section 260 of the Public Health (Ireland) Act, 1878. It provided that "proceedings for the "recovery of demands within the jurisdiction of the "civil bill court, which sanitary authorities are em- "powered to recover in a summary manner, may at "the option of the sanitary authority, be taken in the "civil bill court as if such demands were debts within "the cognizance of such court."

We contend that once the county council had determined that these expenses were debts due to the county council they were recoverable as debts in the County Court.

We suggest that the remedy by civil bill was open to the county council and the decree should have been made in their favour.

[They also referred to *The Vestry of St. Pancras v. Batterbury* (1).]

Davison, K.C., and *Sheil* for the defendant :—

The word "debt" is used to show what particular form of obligation is imposed upon landowners to be enforced before magistrates. The section says these "expenses" shall, if the county council so determine, be a debt due to them and be recoverable in a summary manner. Where a statute creates a remedy which is adequate, that remedy must be followed. The right was created by the statute of 1929. The section sufficiently shows the intention of Parliament.

We submit that the fact that the word "debt" appears in the section does not enable an action to be brought in the County Court or High Court.

We rely on the words used in *The Wolverhampton New Waterworks Company v. Hawkesford* (2), by Willes, J.: "There are three classes of cases in which a liability

(1) 2 C.B. (N.S.) 477. (2) 6 C.B. (N.S.) 336, 356.

"may be established founded upon a statute. One is, "where there was a liability existing at common law, "and that liability is affirmed by a statute which gives "a special and peculiar form of remedy different from "the remedy which existed at common law: there, "unless the statute contains words which expressly "or by necessary implication exclude the common "law remedy, and the party suing has his election to "pursue either that or the statutory remedy. The "second class of cases is, where the statute gives the "right to sue merely, but provides no particular form "of remedy: there, the party can only proceed by "action at common law. But there is a third class, "viz., where a liability not existing at common law "is created by a statute which at the same time gives "a special and particular remedy for enforcing it. "The present case falls within this latter class, if any "liability at all exists. The remedy provided by the "statute must be followed, and it is not competent "to the party to pursue the course applicable to cases "of the second class. The form given by the statute "must be adopted and adhered to. The company "are bound to follow the form of remedy provided by "the statute which gives them the right to sue."

In *Barraclough v. Brown* (1), Lord Watson said: "The right and the remedy are given *uno flatu*, and the "one cannot be dissociated from the other. By these "words (the words being 'or the undertakers may, if "'they think fit, recover such expenses from the "'owner of such boat, barge, or vessel in a court of "'summary jurisdiction') the Legislature has, in "my opinion, committed to the summary court "exclusive jurisdiction, not merely to assess the amount "of expenses to be repaid to the undertaker, but to "determine by whom the amount is payable; and has "therefore, by plain implication, enacted that no "other court has any authority to entertain or decide "these matters."

The word used in the section is "shall," not "may." Under section 260 of the Public Health (Ireland) Act, 1878, authority was expressly given to take proceedings

(1) [1897] A.C. 615, 622.

for the recovery of demands within the jurisdiction of the civil bill court, which sanitary authorities are empowered to recover, in the civil bill court, but no such express leave was given in the Act dealing with the present case.

In *Bailey v. Bailey* (1), Brett, M.R., said: "It is "an old and well-known rule of construing statutes, "that when a special remedy is given for the failure "to comply with the directions of a statute, that "remedy must be followed, and no other can be "supposed to exist."

In *Doe dem. The Bishop of Rochester v. Bridges* (2), it was held that, a statute having prescribed a particular mode for the recovery of an equivalent for land tax redeemed, no other mode could be adapted for enforcing the payment of the equivalent.

In *Couch v. Steel* (3), Lord Campbell said: "If the "statute had prescribed a particular mode by which "a person sustaining actual damage by reason of a "breach of the duty imposed by the statute was to "recover compensation, undoubtedly that mode only "could be adopted."

In *Brooke v. Horner* (4), it was held that when a statute in giving a new right also prescribes the mode of enforcing it, no other remedy can be pursued.

We submit that there is no case which decides that if a statute makes expenses incurred in executing works, a debt recoverable in a summary manner, that distinguishes the case from the authorities we have cited.

We rely on *The Mayor of Blackburn v. Parkinson* (5), where it was held that the Corporation of Blackburn had not the option of enforcing an unliquidated claim for expenses by an action at law, but were confined, in such cases, to the remedy prescribed by sect. 34 of their special Act, and sect. 140 of the Railway Clauses Consolidation Act, 1845, viz., the recovery of the expenses as damages before justices.

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(1) 13 Q.B.D. 855, 859.

(2) 1 B. & Ad. 847.

(3) 3 E. & B. 402.

(4) 11 I.Eq.R. 214.

(5) 1 E. & E. 71.

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We submit that if the statute had intended to give jurisdiction to the County Court, it would have done so in express terms. If when a new right is created, the statute provides a remedy, that is the only remedy which can be followed, unless there is some special distinguishing provision in the statute.

Cur. adv. vult.

MOORE,
L.C.J.

MOORE, L.C.J.: My only doubt in this case is occasioned by the fact which I sincerely regret that I have the misfortune to differ from my Brethren on the Bench who have been good enough to show me their judgments.

There is no question before us that the money is due. The Statute creates a pecuniary liability, and, if there were nothing more, that could properly be held to be cognizable as such in the only tribunal referred to, which reference is contained in the word "summary" and means at Petty Sessions. But the Statute goes further and expressly constitutes the liability "a debt due to the council, if they shall so determine." These words expressly introduced and absent from many corresponding statutes put the liability on the level of an ordinary common law indebitatus count, thus clothing a new statutory cause of action with an ancient remedy.

"Debts" are recoverable in the High Court to any amount, and the only limitation may be where the claim is so small that the High Court considers it beneath its own dignity to grant relief. Common law "debts" are also recoverable by statute in the County Court where the amount does not exceed Fifty pounds (14 & 15 Vic. C. 57, sec. 35, amended by 40 & 41 Vic. C. 56, sec. 50), and at Petty Sessions up to Forty shillings (22 Vic. C. 14, sec. 5).

In the case before us, for some reason wishing to avoid the local justices, the proceedings were brought to recover the present debt in the County Court, and the learned County Court Judge dismissed the civil bill on the ground that he had no jurisdiction to entertain it.

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MOORE, L.C.J.

The question for us is whether or not he was correct in point of law in this opinion.

Counsel for the respondent has pressed upon us the contention that as the summary jurisdiction is the only one mentioned in the statute under discussion, that jurisdiction is the only one in which the statutory relief can be claimed, even though the claim has become a common law debt, and he relies on the maxim "Expressio unius exclusio alterius." His whole case is based on this and if jurisdiction is to be found elsewhere, it must fail.

This maxim, however, is rather suspect in its application. It is not difficult to find reasons for this.

If a statute gives a special jurisdiction to Court A, and is silent as to Courts B and C, is it silent designedly, or is it by accident a *casus omissus ?*

Assuming as a presumption of law that "omnia rite esse presumuntur" and that we are not to accept the *casus omissus*, then what was the intention of the design ? Were Courts B and C deliberately left out because in the opinion of the draughtsman and of parliament, they had the jurisdiction already and it therefore became unnecessary to include them ? Or, on the other hand, were they omitted for the sole reason that not having jurisdiction when the statute became law, it was desired not to extend it to them ? This case stated would be answered in either of two different ways according to our finding as to the real intention of parliament on one or other of the foregoing lines. With such a maxim one must therefore walk warily.

In *Colquhoun v. Brooks* (1), Wills, J., said : "I may "observe that the method of construction summarised "in the maxim 'expressio unius, exclusio alterius,' "is one that certainly requires to be watched. Perhaps "few so-called rules of interpretation have been more "frequently misapplied and stretched beyond their "due limits."

In the same case in the Court of Appeal (2), Lopes, L.J., said : "I agree with what is said in the Court "below by Wills, J., about this maxim. It is often a

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(1) 19 Q.B.D. 400, 406.
(2) 21 Q.B.D. 52.

"valuable servant, but a dangerous master to follow "in the construction of statutes or documents. The "exclusio is often the result of inadvertence or accident;" and he goes on to say that in such cases the maxim should not be applied.

I cannot find any Irish case of importance dealing with this maxim, but *Colquhoun v. Brooks* (1) is still the law and has been referred to so recently as 1925 in *Alianza Co., Ltd., v. Inland Revenue Commissioners* (2), in several passages in the judgment of Lord Cave, and indeed I find it also referred to in no less than two other cases in the same volume, although the particular reference to the maxim is not mentioned, yet the case itself is always spoken of as settled law.

I must therefore decline to place implicit trust in the application of this maxim in the present case, and look for other grounds for my decision.

As I have already pointed out, if it can be held that these proceedings can be brought in any other Court, the whole application of this somewhat doubtful maxim fails. I am of opinion that they could be brought in the High Court and for the following reason. It is old an rule of law, to which I referred during the argument, that everything (which of course includes an action for debt) is "intended" to be within the jurisdiction of a Superior Court; see *Peacock v. Bell* (3), a case dealing with the Palatine Court of Durham. The words in any statute depriving a Superior Court of its jurisdiction must, in the face of this rule, be sufficiently clear to do so. Can it possibly be said that we are compelled to read the words in this statute "shall be recoverable . . . "in a summary manner" as if they were "shall *only* "be recoverable," thereby ousting a Superior Court of its jurisdiction? I think not. The rule also provides as a collateral that nothing is "intended" to be within the jurisdiction of an inferior Court. Therefore "debt" *prima facie* would not be within the jurisdiction of the County Court. But this jurisdiction is expressly given it by the statute I have

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(1) 19 Q.B.D. 400, 406.

(2) [1925] A.C. 644.

(3) 1 Wms. Saund. 69.

MOORE, L.C.J.

referred to, not by intendment. With nothing necessarily inconsistent between the statutes, can we again say that the statutory jurisdiction conferred in the present case is necessarily a repeal *pro tanto* of the statute conferring jurisdiction on the County Court? I think not. This is precisely the form of the decision of course on a different statute, in the case of *Cohen v. Hall* (1), to which we have been referred.

In my judgment, these considerations of themselves would be sufficient to determine the question raised in the Case Stated, but they are greatly strengthened if we can find a reason for the present enactment.

It may be said if the claim can be brought in either of the other Courts, why legislate for the Petty Sessions Court? Apart from the advantages of a more expeditious summary proceeding in addition to the existing methods in the High Court and in the County Court, which may involve some little delay, legislation for the Petty Sessions Court would be necessary to allow a claim exceeding Forty shillings to be prosecuted before that tribunal. This statute before us provides for, and to my mind it is the real reason for the enactment.

I think, therefore, the remedy given is only alternative and not substitutional in any deprivative sense, that there was jurisdiction to entertain the civil bill before the learned Judge in the County Court, but as the majority of the Court hold another view the question will have to be answered in accordance with it.

BEST, L.J.

BEST, L.J.: The question for determination in this case is whether the county council, having incurred certain expenses in scouring and cleansing defendant's drain and having determined that those expenses are a debt due by defendant to themselves, are at liberty to sue him in the County Court; their right to sue him in a summary manner being expressly given in the statute creating the liability. The question arises under section 22 of the Drainage Act (Northern Ireland), 1929, which is substituted for section 12 of the Drainage Act (Northern Ireland), 1925. The material words occur in sub-section (2) of section 22 of the Act of 1929 and are as follows :—" The whole or any part " of the expenses incurred by the county council in " executing such works shall, if they so determine, be " a debt due to the county council by the said person, " and be recoverable from him in a summary manner."

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(1) [1922] 2 K.B. 37.

The matter came before the learned County Court Judge of Fermanagh (Judge Green), who held in favour of defendant's contention that as the section created a new right in the county council and prescribed the remedy for enforcing it, this was the only remedy open to the plaintiffs, and he accordingly dismissed the civil bill without prejudice. From that dismiss an appeal was taken by plaintiffs to the Judge of Assize, Lord Justice Andrews, who has stated a Case on the point for the opinion of this Court.

The general proposition that where a statute creates an obligation and provides a remedy for enforcing it, the only remedy is that pointed out by the statute, is well settled. A list of cases in which this principle has been discussed will be found in the notes to section 249 of the Public Health (Ireland) Act, 1878, in Vanston's Public Health, but it will be sufficient to refer to one of those cases—*Pasmore v. The Oswaldtwistle Urban District Council* (1). At p. 394 of the report the Earl of Halsbury, L.C., says: " The principle that where a specific remedy is given " by a statute, it thereby deprives the person who " insists upon a remedy of any other form of remedy " than that given by the statute, is one which is very " familiar and which runs through the law." I think Lord Tenterden accurately states that principle in the case of *Doe v. Bridges* (2). He says : " Where an " Act creates an obligation and enforces the performance in a specified manner, we take it to be a " general rule that performance cannot be enforced " in any other manner." The words of Lord Halsbury's speech which follow are important as regards the present case not only generally but also by reason of the fact that the obligation was first created by the Act of 1925, section 12, which section has had sub-

(1) [1898] A.C. 387, 394.

(2) 1 B. & Ad. 847, 859.

stituted for it section 22 of the Act of 1929. Lord Halsbury says: "The obligation which is created by "this statute" (he is referring to The Public Health Act, 1875) "is an obligation which is created by the "statute and by the statute alone. It is nothing to "the purpose to say there were other statutes which "created similar obligations, because all those statutes "are repealed; you must take your stand upon the "statute in question, and the statute which creates the "obligation is the statute to which one must look to "to see if there is a specified remedy contained in it. "There is a specified remedy contained in it, which is "an application to the proper Government Department."

The principle here enunciated is, in my opinion, applicable to the present case and should not be departed from merely because it is declared in the substituted section, as it was declared originally in section 12, that the whole or any part of the expenses incurred by the county council in executing the works shall on their determination be a "debt due" to them. It is contended that as the expenses in whole or in part are by the determination of the county council thereby constituted a debt due to the council, all remedies for enforcing debts are open to them, and reliance is placed upon a passage in the speech of Lord Herschell in *Barraclough v. Brown* (1). In that case, Sir W. Phillimore for the appellants, who sought relief in a High Court action, argued that although the Act under which they sued, the Aire & Calder Navigation Act, 1889, prescribed recourse to a Court of Summary Jurisdiction, yet no objection was raised below, both parties desired the decision of the High Court, and the Act did not exclude the jurisdiction of the latter. He further argued that a debt was created which was recoverable in the way in which other debts may be sued for. These contentions were rejected and Lord Herschell, at p. 619, says: "The respondents were "under no liability to pay these expenses at common "law. The liability, if it exists, is created by the "enactment I have quoted. No words are to be

(1) [1897] A.C. 615.

"found in that enactment constituting the expenses "incurred a debt due from the owners of the vessel. "The only right conferred is 'to recover such expenses " 'from the owner of such vessel in a Court of summary "'jurisdiction.' I do not think the appellant can "claim to recover by virtue of the statute, and at the "same time insist upon doing so by means other than "those prescribed by the statute which alone confers "the right."

None of the other learned Law Lords base their judgments on the absence from the enactments of words constituting the expenses a debt, and Lord Watson, at p. 622, says: "The only right which the "undertakers have to recover from an owner is "conferred by these words—'Or the undertakers may, "'if they think fit, recover such expenses from the "'owner of such boat, barge, or vessel in a Court of "'Summary Jurisdiction."' He adds, "the right "and the remedy are given *uno flatu*, and the one "cannot be dissociated from the other. By these "words the Legislature has, in my opinion, committed "to the Summary Court exclusive jurisdiction, not "merely to assess the amount of expenses to be repaid "to the undertaker, but to determine by whom the "amount is payable; and has therefore, by plain "implication, enacted that no other Court has any "authority to entertain or decide these matters. "The objection is one which, in my opinion, it is "*pars judicis* to notice, because it arises on the face "of the enactment which your Lordships are asked to "enforce in this appeal."

In my opinion, this case, so far from being an authority for the proposition contended for by the county council, is in direct opposition to it.

In trying to solve the question before us, I think sufficient attention has not been paid to sub-section 3 of section 22. It provides that any person who deems himself aggrieved by the service upon him of a notice, or by anything done by a county council, under this section, may appeal to the County Court under section twenty-six of this Act, *i.e.*, of the Act of 1925.

Now a determination by the county council that the whole or any part of the expenses incurred by it in executing the works is a debt due to them by the said person is a thing done by the county council under the section and is therefore appealable to the County Court. The section (26) regulating appeals provides that the appeal may be taken to the County Court in like manner as a person aggrieved by any matter or thing done under The Public Health (Ireland) Act, 1878, by a Court of Summary Jurisdiction may appeal under section 269 of that Act ; and paragraphs (1), (2), (3), (6) and (7) of that section shall apply accordingly with such adaptations as may be prescribed. . . . Paragraph (7) of section 269 of The Public Health Act, 1878, provides that the decision of the Court of Appeal shall be binding on all parties, provided that the Court of Appeal may, if such court thinks fit, state the facts specially for the determination of a Superior Court.

The person, then, who deems himself aggrieved by the determination of the county council in fixing the amount of his debt to them, may, on appeal to the County Court, have the matter re-investigated and finally settled.

Where the Legislature intended that recourse should for any purpose be had to a Court other than one of summary jurisdiction, it has specifically said so, as in the instance now under consideration. Further, to give to the section the construction contended for by the county council would produce the following results. If when the expenses have been determined by the county council to be a debt due to them, the person involved is sued in a Court of Summary Jurisdiction, and he can be sued in that Court for any amount, such person has no appeal, for on this point none is provided by the Act. If he is sued in the County Court, he can appeal to the Judge of Assize, and if he is sued in the High Court he can appeal to this Court and finally to the House of Lords. I cannot put upon the section a construction which necessarily leads to such startling conclusions.

In my opinion the section was intended to provide a cheap and expeditious method of fixing responsibility

Best, L.J.

upon a person who has neglected to scour out or cleanse the watercourses running through his land, and it was with this object in view that jurisdiction is given to the Summary Court to order once for all the payment of the debt due to the county council, thereby avoiding inordinate delay and unnecessary expense.

I think the question put by the learned Lord Justice should be answered in the negative.

Wilson, J.

WILSON, J.: In my judgment the question submitted by Lord Justice Andrews should be answered in the negative.

The liability of the defendant to pay the plaintiffs the expenses incurred by the county council in scouring out and cleansing the drain or watercourse mentioned and the debt which the county council has determined to be due by the defendant to the plaintiffs in respect thereof were both new liabilities created for the first time by the Drainage Acts (Northern Ireland), 1925 and 1929, and prior to those statutes could not have been recovered by the plaintiffs from the defendant in any Court of law as these liabilities did not then exist.

Indeed the case stated expressly states that the amount (*i.e.*, the debt) sued for is claimed to be due under sec. 22 of the Drainage Act (Northern Ireland), 1929. This section then provides that this debt "shall "be recoverable from the defendant in a summary "manner."

The law seems to be stated clearly by Willes, J., in the case of *Wolverhampton New Waterworks v. Hawkesford* (1), where he says there are three classes of cases where a liability may be established founded upon a statute. (1) When the liability already existed at common law and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law, then the party suing (unless the statute by express words or necessary implication excludes the common law remedy) has his choice to pursue either the new special remedy or the old common law remedy.

(1) 6 C.B. (N.S.) 337, 356.

(2) When the statute gives the right to sue merely, but provides no particular form of remedy; there the party suing must proceed at common law. (3) Where a liability not existing at common law is created by a statute which at the same time gives a special and peculiar remedy for enforcing the liability; there the remedy provided by the statute must be pursued and it is not competent for the party to sue at common law. There may be an apparent exception to this last class in cases where an injunction to protect the new right is sought.

In my judgment the case falls within the third class. The expenses claimed are expenses only recoverable under the statute and the debt is not a debt due by the defendant at common law. It is a statutory debt. It seems to me to follow that this new statutory liability and debt can only be recoverable in a summary manner as provided by the statute which created them.

The jurisdiction of the High Court and the County Court to entertain this claim is not taken away or ousted. It simply never existed either at common law or under the statute.

Solicitor for the plaintiff: *Sir Charles F. Falls.*
Solicitors for the defendant: *Maguire & Herbert.*

J. McC.

K.B.D.
1931.

Aug. 21, 28.

McCRORY v. McCRORY (1).

(1931. No. 2507.)

Practice—Motion to remit action to County Court—Affidavit—Sufficiency of averment—Statement of defence—Common Law Procedure Act (Ireland), 1870, (33 *&* 34 *Vict., c.* 109) *section* 5.

The plaintiff had been surety for the defendant, and was sued in that capacity, and had to pay. He then brought an action against the defendant to recover from him the sum which he (the plaintiff) had been obliged to pay as surety. The defendant moved to remit the action to the County Court under section 5 of the Common Law Procedure Act, 1870, and stated in his affidavit that he had a good and valid defence to the action brought against him for he said that he did not owe the sum of £44 10*s.* 7*d.*, being the amount claimed by the plaintiff in the writ of summons, or any part thereof.

Held, by Andrews, L.J. (sitting as Vacation Judge) that the averment in the defendant's affidavit was defectivo in not setting out his grounds of defence or any particulars which would enable the Court to say if there was a *bona fide* contest as to plaintiff's claim, and that the motion must be refused.

MOTION TO REMIT.

The plaintiff had been surety for the defendant to an auctioneer, named James Higgins. James Higgins sued the plaintiff as surety and he was obliged to pay. The plaintiff then brought an action in the High Court against the defendant to recover the sum of £44 10*s.* 7*d.*, being the sum which the plaintiff had paid as surety for the defendant.

The defendant moved to remit the action to the County Court under section 5 (the contract section) of the Common Law Procedure Act, 1870. The defendant's affidavit contained the following averment "that I have a good and valid defence to the action brought against me for I say I do not owe the sum of £44 10*s.* 7*d.*, being the amount claimed by the plaintiff in the said writ of summons or any part thereof."

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(1) Before Andrews, L.J., sitting as Vacation Judge.

Maginess, for the plaintiff :—

The defendant's averment is insufficient. The law is stated in Wylie's Judicature Acts (p. 1197, note (*d*)) : "The Court must be satisfied that there is a *bona fide* contest as to the plaintiff's claim. . . . The affidavit to remit ought to state so much of the facts constituting the defence as will enable the Court to see that the case is *bona fide* contested."

I rely on *Devlin v. Flaherty* (1). There a motion had been brought for an order that an action brought under section 5 of the Common Law Procedure Act, 1870, should be tried in the civil bill court. The defendant in his affidavit stated that he had a good defence to the action, and intended to contest the plaintiff's claim.

Monahan, C.J., in delivering the judgment of the Court, said that the motion must be refused. Continuing, he said : " We are of opinion that before we grant " such a motion, we ought to be satisfied that there is a " *bona fide* contest as to the plaintiff's claim, and that " we ought not to consider as conclusive the defendant's " affidavit that he has a defence on the merits, and " means to contest the plaintiff's claim. Upon the " affidavits which have been made, we are not satisfied " of the existence of any such *bona fide* contest but, on " the contrary, that the defendant has no defence."

I also rely on *Halford v. Hayes* (2).

Copeland, for the defendant :—

The paragraph in the defendant's affidavit is in the usual form. It has been the practice to consider that form sufficient.

Cur. adv. vult.

ANDREWS, L.J. : This is a motion to remit an action in contract under section 5 of the Common Law Procedure Act (Ireland), 1870. The action was brought to recover the sum of £44 10*s*. 7*d*., being the amount paid by the plaintiff as surety for the defendant.

ANDREWS,
L.J.

(1) I.R. 5 C.L. 137. (2) I.R. 9 C.L. 550.

In support of his motion the defendant filed an affidavit in which he stated: "I have a good and valid "defence to the action brought against me, for I say "I do not owe the sum of £44 10*s.* 7*d.*, being the "amount claimed by the plaintiff in the writ of "summons, or any part thereof." It is submitted on behalf of the plaintiff that this affidavit is defective as it does not set out the grounds of defence or any particulars which would enable the Court to say if there is any *bona fide* contest as to the plaintiff's claim. I may say that upon the point being raised I expressed my willingness to grant the defendant an adjournment on terms as to costs to enable him to file a supplemental affidavit, but my offer was refused, and the matter must, accordingly, now be determined on the strict legal rights of the parties.

It is necessary in the first instance to consider the section itself, under which the defendant's right to make the application exists only "if the whole or any "part of the demand of the plaintiff be contested." This must mean, as Mr. Maginess has contended, "*bona fide* contested." A bogus or obviously fraudulent defence would not in my opinion amount to a contest within the section. It must be a real or genuine contest, though, of course, not one upon which the defendant will necessarily be successful. I think this view is fully borne out by the authorities. In *Devlin v. Flaherty* (1), Monaghan, C.J., delivering the judgment of the Court of Common Pleas, refused the defendant's motion where the affidavit merely stated that the defendant had a good defence to the action, and intended to contest the plaintiff's claim. The ground of the decision was that the Court were of opinion that before they granted such a motion they ought to be satisfied that there was a *bona fide* contest as to the plaintiff's claim. The Court of Exchequer, presided over by Palles, C.B., took the same view in *Halford v. Hayes* (2), holding that a statement "that "the defendant hath a just and true defence to the "action on the merits and intends to contest same" was insufficient. "Contested," said the Chief Baron,

(1) I.R. 5 C.L. 137.

(2) I.R. 9 C.L. 550.

"of course means *bona fide* contested. We cannot "determine this unless we know the facts which "constitute the defence." Dowse, B., added that in his opinion "a convenient rule to lay down is to require "the party moving to remit to show the Court at least "so much as this Court requires him to do before he "can get security for costs under section 52 of the "Common Law Procedure Act, 1853." The wording of this section was embodied in Or. 29, r. 3, and the requirements of the Court as to a "satisfactory "affidavit," within the section and rule will be found laid down by the Court of Appeal in *Walker v. Atkinson* (1) Finally, I would refer to another decision of the Court of Appeal— *Bridgett v. Bridgett* (2), in which the rule laid down in *Devlin v. Flaherty* (3) was expressly followed.

These authorities are sufficient to determine the present motion in the plaintiff's favour ; but, to prevent possible misapprehension, I would like to point out—*obiter* though my words may be—that the rule to which I have referred does not apply to a motion to remit brought under the "tort" section. This section contains no similar words as to the necessity for the demand being "contested"; and a reason for this omission lies in the fact that in a general indorsement in an action for tort the cause of action is by no means as clear, and the defendant frequently has not an opportunity of knowing until after the statement of claim has been delivered what the exact matter of complaint really is. The practice in motions under the tort section is clearly established in *Buckley v. Buckley* (4), *Mullan v. D. W. and W. Ry.* (5), and *Tierney v. Murphy* (6).

The defendant's motion must be refused with costs.

Solicitors for the plaintiff : *Shields & Murnaghan.*
Solicitors for the defendant : *Joseph Smith & Son.*

J. McC.

(1) [1875] 1 I.R. 246.
(2) 44 I.L.T.R. 229.
(3) I.R. 5 C.L. 137.
(4) 12 I.L.T. 49.
(5) 37 I.L.T.R. 16.
(6) 54 I.L.T R 196

K.B.D.
(Probate)
1931.

Dec. 11.

IN THE GOODS OF EDWARD NELSON (1).

Probate—Practice—Application for order requiring executor to bring in and lodge will—Necessity for, before motion for attachment—Court of Probate Act (Ireland), 1857 (20 *&* 21 *Vict., c.* 79, *s:* 31)*—Court of Probate Act (Ireland),* 1859 (22 *&* 23 *Vict. c.* 31, s. 19).

The deceased by his will devised and bequeathed all his property to A. N. whom he appointed his sole executor A. N. took no steps to prove the will and failed to comply with a citation, served upon him at the instance of a judgment creditor of the deceased, calling upon him to introduce and deposit the will and to accept or refuse probate thereof. The present application was made under section 31 of the Court of Probate Act (Ireland), 1857, for an order requiring A. N. to bring in and deposit the will. It was suggested that a subpœna should have been issued as provided by section 19 of the Court of Probate Act (Ireland), 1859, and an application then made to attach the executor in the event of his failing to produce the will.

Held, that the proper procedure was under sec. 31 of the Court of Probate Act (Ireland), 1857.

In the Goods of John Healy (1 N.I.J.R. 77) followed.

Motion on behalf of Robert S. Tavener for an order requiring Alexander Nelson to bring in the will of Edward Nelson, deceased, and deposit the same in the Principal Probate Registry.

The following facts appeared from the motion paper :

Edward Nelson, of Mullaghconnolly, in the County of Fermanagh, died on 21st March, 1931, having made his last will, dated 31st December, 1930, whereby he devised and bequeathed all his property to his son, Alexander Nelson, whom he appointed his sole executor.

Robert S. Tavener had on 12th February, 1931, obtained a judgment against the said Edward Nelson for the sum of £100 and costs, which judgment remained unsatisfied to the extent of £71 9*s.* 8*d.*

On 27th June, 1931, a citation to introduce and deposit the deceased's will and accept or refuse probate thereof was issued forth of the Principal Probate

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(1) In the King's Bench (Probate) before Brown, J.

Registry and duly served upon Alexander Nelson but he failed to comply therewith.

In the Goods of Edward Nelson.

McCoy, for Robert S. Tavener, applied for an order, under section 31 of the Court of Probate Act (Ireland), 1857, requiring Alexander Nelson to produce and bring the will into the Principal Probate Registry.

Brown, J.

[Brown, J.: If I make the order sought a further application for attachment will be necessary in the event of Tavener disobeying it. Should a subpœna not have issued, under section 19 of the Court of Probate (Ireland) Act, 1859, requiring him to bring in the will? This would have enabled you to move to attach him if he failed to do so.]

McCoy: The procedure which has been adopted is in accordance with the practice of the Court and follows that indicated in *In the Goods of John Healy* (1).

Brown, J. thereupon made an order under section 31 of the Court of Probate Act (Ireland), 1857, directing Alexander Nelson to bring in and lodge the will in the Principal Registry.

Solicitor for the applicant: *R. H. McCoy.*

J. D. C.

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(1) 1 N.I.J.R. 77.

K.B.D.
1932.

March 4.

McWATTERS v. MAXWELL (1).

Practice—Particulars of negligence.

In an action brought under the Fatal Accidents Act, 1846, in respect of the alleged negligence of the defendant in the driving of a motor car, the particulars of negligence furnished by the plaintiff included the following paragraph :—" The plaintiff will rely also upon any other acts or omissions of the defendant constituting negligence or breach of duty as may be given in evidence or otherwise appear at the trial of this action."

Upon a motion brought by the defendant for an order striking out this particular it was ordered that the following should be substituted :—" The plaintiff will also rely on such facts in proof of the negligence alleged in the statement of claim as are in the knowledge of the defendant but not of the plaintiff and appear in the evidence of the defendant and her witnesses at the hearing of the action " The order further provided that the plaintiff should have liberty to rely also upon such other particulars of negligence as the plaintiff might, not later than ten days before the commencement of the trial of the action, give notice of, in writing, to the defendant.

Motion : The plaintiff, Margaret McWatters, brought an action under the Fatal Accidents Act, 1846, in respect of the death of her son, Sidney McWatters, which was alleged to have been caused by negligence of the defendant in the driving and management of a motor car. Upon being required to furnish particulars of the negligent and unskilful driving and management referred to in the statement of claim, the plaintiff furnished particulars which specified a number of acts of negligence and concluded with the following paragraph :

> " The plaintiff will rely also upon any other acts
> " or omissions of the defendant constituting negli-
> " gence or breach of duty, as may be given in
> " evidence or otherwise appear at the trial of this
> " action."

The defendant brought the present motion for an order that the said paragraph should be struck out, or in the alternative that the plaintiff should be ordered to furnish further and better particulars of the alleged negligence.

(1) In the King's Bench Division before Best, L.J.

Murphy, K.C., and *Chambers* for the defendant:

McWatters v. Maxwell.

The paragraph in dispute might enable the plaintiff to conceal the real ground upon which the action is based and thus defeat the object of particulars.

MacDermott for the plaintiff:

The plaintiff has furnished particulars of all the acts of negligence of which she is at present aware, but further acts constituting negligence may come to light in the evidence adduced at the trial. Should this happen the plaintiff ought not to be precluded, in the circumstances of the present case, from relying on such further acts of negligence. It is with the object of rendering such evidence admissable that the paragraph, which is now in dispute, is included in the particulars.

[He referred to a similar particular in *Scott v. Brookfield Linen Co., Ltd.* (1)]

Best, L.J

Best, L.J. ordered that the particular to which exception was taken should be struck out and that in lieu thereof the following should be substituted:—

> "The plaintiff will also rely on such facts in proof "of the negligence alleged in the statement of claim "as are in the knowledge of the defendant but not "of the plaintiff and appear in the evidence of the "defendant and her witnesses at the hearing of the "action."

The order further provided that the plaintiff should have liberty to rely also upon such other particulars of negligence as the plaintiff might, not later than ten days before the commencement of the trial of the action give notice of, in writing, to the defendant.

The plaintiff was ordered to pay the costs of the motion.

Solicitors for the defendant: *C. & H. Jefferson.*
Solicitor for the plaintiff: *R. Bryan MacKeown.*

J. D. C.

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(1) [1910] 2 I.R. 509.

C.A.
1931.

BURNISTON v. CORPORATION OF BANGOR (1).

Oct. 29.
Nov. 12.

Waterworks—Burst in line of pipes on county road—Flooding—Liability of local authority—Absence of negligence—Parliamentary powers.

The defendants by a private Act were authorised to make and maintain a reservoir some distance outside the town of B. and to carry water therefrom down to and along the road to B., in a line of pipes, and to distribute this water for payment in the town of B.

The plaintiff owned and occupied a shop on this road to B. and about one and a half miles outside the town of B.

On 10th March, 1931, the plaintiff discovered that his shop was surrounded, and his premises cut off from the county road by water, and it was ascertained that the water which caused the flooding came from a burst in the line of pipes on the county road near the plaintiff's shop.

Held, by the Court of Appeal (Andrews and Best, L.JJ.), that the defendants were not liable for the damage done to the plaintiff's property by the bursting of the main or water pipe on the county road in the absence of all proof of negligence on the part of the defendants, causing the damage complained of, other than the actual bursting of the pipe.

Case Stated for the opinion of the Court of Appeal in Northern Ireland by Wilson, J., at the County of Down Summer Assizes, 1931, on an appeal by the defendants from a decree for £9 10*s.* 0*d.*, granted by the County Court Judge of Down on 22nd June, 1931.

The case stated set out—

The defendants by Act of Parliament are authorised to maintain a reservoir some distance outside the Town of Bangor and to carry water therefrom down to and along the Holywood to Bangor road in certain pipes or mains and to distribute same for payment in the town of Bangor.

The plaintiff is the owner and occupier of a shop and premises on the south side of the said road near the junction of the Holywood-Bangor and the

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(1) In the Court of Appeal before Andrews and Best, L.JJ.

Rathgael roads, and about one and a half miles outside the town of Bangor.

About 7 o'clock, a.m., on 10th March, 1931, the plaintiff discovered that his shop was surrounded with water and his premises thereby cut off from the county road. Later it was discovered that the flood waters came from a burst in the said water main, the property of the defendants, on the county road. The plaintiff sent word to the defendants about 11 o'clock, a.m., but defendants did nothing to stop the flooding or get rid of the waters till after their officials returned from their mid-day meal, and eventually the breach in the main pipe was stopped and the waters subsided at about 7 o'clock, p.m., on the same day.

There was no dispute as to the amount of the damages but defendants contended that they were empowered and compelled by Act of Parliament to construct the water main and to keep it filled with water at full pressure. That neither the defendants' private Act of 1905 (under which they had constructed and maintained one of their water supplies for Bangor town) nor The Waterworks Clauses Act, 1847, nor the sections of the Public Health Act, contained any clause providing that nothing in the Acts should exempt the defendants from nuisance, and, consequently, the defendants were not liable except for negligence, and there was no evidence of negligence, and *Rylands v. Fletcher* (L.R. 3 H.L. 330) did not apply.

Curran, for the Plaintiff, contended that—

(*a*) *Rylands v. Fletcher* (L.R. 3 H.L. 330) did apply :

(*b*) It would be most unjust to allow the Bangor people to accumulate water artificially in a reservoir, discharge it into pipes or mains and carry it along the public roads outside the limits of Bangor and deliver it for payment to their townsfolk in Bangor, and, if the pipes burst outside the limits of Bangor and water deluged and damaged property in a rural district, the Bangor Corporation could say, " As we did all this under the powers of "an Act of Parliament we are not liable "unless you prove negligence." The fact is that the Acts of Parliament only authorise defendants to carry water from the reservoir into Bangor but nowhere authorize defendants to deluge the country districts lying between the reservoir and the boundary of Bangor Town, with this water:

(c) No section of any Act of Parliament authorizes this trespass, viz.: by legally bringing the water artificially on to the county road in a main the property of defendants and letting it escape thence and flood the plaintiff's premises for over a day:

(d) The bursting of the main may, *ipso facto*, be some evidence of negligence, as probably the whole water system, including the burst main, may have been laid down in 1905 or 1906—twenty-five years ago:

(e) In any event the defendants are clearly liable for a great part if not all of the damage. If the defendants are not liable for the original bursting of the main, they were told of the flooding shortly after 11 o'clock, a.m., and they did nothing to stop the flooding till their servants had their mid-day meal. Then they inspected carefully and concluded that the Conlig supply should first be turned on; this took a lot of time, and finally the flooding was not stopped till 7 o'clock, p.m. This was negligent conduct which would not have occurred only defendants thought they could not be made liable at all. If the defendants had turned on the Conlig supply at once, on hearing of the flooding, the leak in the main could have been easily stopped by 1 o'clock, and more than half of the damage could have been avoided.

I was clearly of opinion that defendants were guilty of negligence in not at once taking the proper expert steps to stop the flooding when they heard shortly after 11 o'clock, a.m., that their water main had burst and was flooding the plaintiff's premises, and that they could, if proper and prompt steps had been taken, have saved Five pounds of the loss to plaintiff's property. It appears that there are conflicting decisions or dicta on the principal question, viz. : Are the defendants liable for all damage caused by the bursting of their water main in the absence of positive proof that the bursting of the main was caused by some negligence of the defendants ? It would be a great advantage to the defendants if it could be decided that they are not liable for any damage caused by any of their municipal undertakings which are authorised by Act of Parliament unless negligence is proved against them, especially in the case of this waterworks undertaking, which is now upwards of twenty-five years old and which stretches all the way from Ballysallagh reservoir to Bangor. A decision of the Court of Appeal would settle the point in Northern Ireland for ever.

I offered to state a case for the defendants on the principal point on the terms that the defendants do pay the costs of the case stated in any event.

The question for the Court is :

> Are the defendants liable for the entire damage done to plaintiff's property by the bursting of defendant's main or water pipe on the county road in the absence of all proof of negligence on the part of the defendants causing the damage complained of other than the actual bursting of the pipe ?

If the answer to the question be " Yes " the decree for Nine pounds ten shillings is to be affirmed with One pound eighteen shillings and three pence costs in Court below and Two pounds twelve shillings and three pence costs of Appeal and One pound witnesses' expenses.

If the answer to the question be " No " the decree is to be reduced to Five pounds with One pound eleven shillings costs in the Court below and Two pounds four shillings and nine pence and One pound witnesses' expenses.

McGonigal, K.C. (with him *Hume*) for the Corporation of Bangor:—

The main question to be decided is when no proof of negligence has been shown on the part of the defendants, and there is no clause in the local Acts making the local authority liable for nuisance, are the defendants liable for the damage which ensued. The effect of the sections in the local Acts is that the defendants are bound to provide an adequate supply of water. The defendants are authorised to construct the reservoir and to provide an adequate supply of water but they are not liable for any damage except in case of negligence. We rely strongly on *Green v. Chelsea Waterworks Company* (1), which we submit is directly in point.

In *Geddis v. Proprietors of Bann Reservoir* (2) Lord Blackburn said in his speech in the House of Lords, "For I take it, without citing cases, that it is now "thoroughly well established that no action will lie "for doing that which the legislature has authorized, "if it be done without negligence, although it does "occasion damage to anyone; but an action does lie "for doing that which the legislature has authorized "if it be done negligently."

The following cases were also referred to:—*Price v. South Metropolitan Gas Company* (3), *Midwood & Co., Limited v. Manchester Corporation* (4), *Charing Cross, West End and City Electricity Supply Company v. London Hydraulic Power Company* (5).

Beattie, K.C., and *Curran* for the plaintiff:—

We rely on the words used by Lord Watson in *Metropolitan Asylum District v. Hill* (6), where he said, "Where the terms of the statute are not imperative, "but permissive, when it is left to the discretion of "the persons empowered to determine whether the "general powers committed to them shall be put into

(1) 10 T.L.R. 259.
(2) 3 App. Cas. 430, 455.
(3) 65 L.J. (Q.B.) N.S. 126.
(4) [1905] 2 K.B. 597.
(5) [1913] 3 K.B. 442, [1914] 3 K.B. 772.
(6) 6 App. Cas. 193, 213.

"execution or not, I think the fair inference is that "the Legislature intended that discretion to be "exercised in strict conformity with private rights, "and did not intend to confer licence to commit "nuisance in any place which might be selected for "the purpose."

The Legislature does not give *carte blanche* to commit a nuisance. The powers given in the present case were only permissive. We submit that the words used by Lord Watson apply to the present case. The Act of Parliament must be subject to the rights of private individuals. The presence or absence of words importing nuisance does not affect the question. The plaintiffs must carry out these works subject to the rights of private individuals.

[They also referred to *Midwood & Co., Limited v. Manchester Corporation* (1), and *Charing Cross Electricity Supply Company v. Hydraulic Power Co.* (2).]

McGonigal, K.C. (in reply):—

We submit that the law on the subject is correctly stated by Lord Blackburn in *Geddis v. Proprietors of Bann Reservoir* (3), in the passage to which I have already referred.

In *London and Brighton Railway Co. v. Truman* (4), Lord Selborne distinguished that case from *Metropolitan District v. Hill* (5), and points out that the principle of the decision in the latter case, was not applicable to the case of all land purchased otherwise than under compulsory powers, or within prescribed and definite local limits. We submit that Lord Watson in *Metropolitan District Asylum v. Hill* (6), stated the principle applicable in terms which were much too wide. There is a clear distinction between cases like the present, where the work is to be done on a defined line, and cases like *Metropolitan Asylum District v. Hill* (6), where the work was to be done, on a situation not defined. *Cur. adv. vult.*

(1) [1905] 2 K.B. 597.
(2) [1913] 3 K.B. 442, [1914] 3 K.B. 772.
(3) 3 App. Cas. 430, 455.
(4) 11 App. Cas. 45, 57.
(5) 6 App. Cas. 193.
(6) 6 App. Cas. 193, 213.

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1931.

BURNISTON
v.
CORPORATION OF
BANGOR.

ANDREWS,
L.J.

Nov. 12.

ANDREWS, L.J.: The issue to be determined in this case stated is the extent of the defendants' liability for damage done to plaintiff's property by the bursting of defendants' main or water pipe on the county road. The material facts are clearly set out in the case and need not be repeated. It is sufficient to say that Mr. Justice Wilson, who stated the case, has held that the plaintiff is in any event entitled to a decree for Five pounds, being the damage which was in his opinion attributable to the defendants' negligence in not at once taking proper steps to stop the flooding when they heard that their water main had burst and was flooding the plaintiff's premises. With this matter we have therefore no concern; and we are merely asked to determine the defendants' liability, if any, for the initial damage caused by the bursting of the main in the absence of positive proof that this was caused by the defendants' negligence. It was admitted before us that the mere bursting of the pipe was not in itself evidence of negligence, and that the case was stated on this basis.

Mr. Justice Wilson had ample justification for saying that there were conflicting decisions or dicta on the question. I shall not attempt to undertake the vain task of trying to reconcile them; and shall content myself with a statement of what I conceive to be the law as based on both principle and accepted authority.

The case presented on behalf of the plaintiff is founded on the application of the well-known principle of *Rylands v. Fletcher* (1), that a person who for his own purposes creates, collects or brings on to his property anything which has a tendency to escape beyond his control, and, if it does escape, is likely to do injury to his neighbours, must keep it at his peril, and he is liable for the damage caused by its escape. There is no doubt that this principle, which establishes a liability wholly distinct from that for negligence, may apply not only to cases in which the dangerous thing has escaped from the defendants' land on to the plaintiff's land and done damage there, but also to cases in which the plaintiff's or defendants' occupation

(1) L.R. 3 H.L. 330.

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was only under a licence and not under any right of property in the soil. *Charing Cross Electricity Supply Co. v. Hydraulic Power Co.* (1), and *Rainham Chemical Works, Ltd. v. Belvedere Fish Guano Co., Ltd.* (2). Does it, however, apply to the facts of the present case ?

The argument for the defence is the principle, to be found enunciated in innumerable judgments, but nowhere more clearly than by Lord Blackburn, in *Geddis v. Proprietors of Bann Reservoir* (3), where he said that : "it is now thoroughly well established that "no action will lie for doing that which the Legislature "has authorised, if it be done without negligence, "although it does occasion damage to anyone ; but "an action does lie for doing that which the Legis-"lature has authorised, if it be done negligently." These words, which negative the application of the principle of *Rylands v. Fletcher* (4), were recently referred to by Lord Shaw of Dunfermline, as remaining of the highest authority in an appeal from this Court in *The Lagan Navigation Co. v. Lambeg Bleaching Co.* (5), and were accepted by him in support of his assertion that the avoidance of liability by authorities acting strictly in execution of statutory powers and without negligence is clear.

From the mass of relevant authority, of which *Rex v. Pease* (6), *Vaughan v. Taff Vale Railway Co.* (7), and *Hammersmith Railway Co. v. Brand* (8), are, perhaps, most frequently cited, I shall select only a few cases which appear to me to resemble the present case most closely both in their facts and in the principles of law which are involved. In *Dunn v. Birmingham Canal Navigation* (9), the defendants, who had been "authorised" by Act of Parliament to construct a canal, were guilty of no actual carelessness in the management of it ; yet, owing to strata becoming dislocated, water escaped from it and flooded the plaintiff's coal mine.

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(1) [1913] 3 K.B. 442,
[1914] 3 K.B. 772.
(2) [1921] 2 A.C. 465.
(3) 3 App. Cas. 430, 455-6.
(4) L.R. 3 H.L. 330.
(5) 1927 [N.I.] 24, 43.
(6) 4. B. & Ad. 30.
(7) 5 H. & N. 679.
(8) L.R. 4 H.L. 171.
(9) L.R. 7 Q.B. 244,
L.R. 8 Q.B. 42.

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It was held that the principle of *Rylands v. Fletcher* (1) did not apply, and that no action could be maintained; for, as Cockburn, C.J., put it, the act of the defendants, on which the plaintiffs rely as having caused the damage of which they complain, being that of keeping water in the canal, and this having been made lawful in the Company by the statute, it is impossible to say that what is thus expressly legalized can be made the ground of an action of tort. Mellor, J., and Bramwell, B., expressed precisely the same idea in a different way when they pointed out that no action at law will lie unless there be a legal injury and resulting damage, and that in the case before them there was a *damnum absque injuria* by authority of the legislature.

In *Snook v. The Grand Junction Waterworks Co., Ltd.* (2), a Waterworks Company, incorporated by Act of Parliament for the purpose of supplying water, was protected from the doctrine established in *Rylands v. Fletcher* (1), when water escaped through a fracture in their main. The view of Huddleston, B., was evidently endorsed by the jury that water companies could not seriously be expected to have a system for inspecting and testing their pipes, and, accordingly, that it was not negligence because they had not some such system in operation.

Finally, I come to *Green v. Chelsea Waterworks Co.* (3), of which the best report is in 70 L.T. at p. 547. In that case, also, a main belonging to a waterworks company burst, and water flooded the plaintiff's premises causing damage. Once again *Rylands v. Fletcher* (1) was distinguished; and the Court of Appeal, following the decision in *Dunn v. The Birmingham Canal Co.* (4), affirmed the decision of Mathew, J., and held that, as the company was authorised by Act of Parliament to lay the main and had been guilty of no negligence, it was not liable in damages to the plaintiffs. A waterworks company, exercising its statutory powers, was, it was held, in a totally

(1) L.R. 3 H.L. 330.

(2) 2 T.L.R. 308.

(3) 70 L.T. 547 and 10 T.L.R. 175, 259.

(4) L.R. 7 Q.B. 244 and L.R. 8 Q.B. 42.

different position from a private individual storing water on his own land for his own purposes, and ought not in a case of the kind to be treated as insurers, responsible for things which no reasonable care or skill could prevent.

The authority of these cases has never to my knowledge been judicially questioned, and in my opinion they are sufficient to determine the present case. Plaintiff's counsel, however, strenuously endeavoured to distinguish *Green v. Chelsea Waterworks Co.* (1), on the ground that, as they contended, the duty cast upon the company of constructing the waterworks in that case was mandatory, whereas the duty imposed by statute upon the defendants in the present case in constructing the reservoir and laying the pipes was purely optional. Their argument was founded on a frequently cited passage from the speech of Lord Watson in *Metropolitan Asylum District v. Hill* (2), in which he said: "Where the terms of the "statute are not imperative, but permissive, when it "is left to the discretion of the persons empowered "to determine whether the general powers com- "mitted to them shall be put into execution or not, I "think the fair inference is that the Legislature "intended that discretion to be exercised in strict "conformity with private rights, and did not intend "to confer licence to commit nuisance in any place "which might be selected for the purpose."

Counsel supported this argument by reference to a passage in the judgment of Lord Sumner in *Charing Cross Electricity Supply Co. v. Hydraulic Power Co.* (3), where he said: "that *Green v. Chelsea Waterworks* "*Co.* (1), was an illustration of the principle that "if "the Legislature had *directed and required* the under- "taker to do that which caused the damage, his "liability must rest upon negligence in his way of "doing it, and not upon the act itself." Now, in my opinion, the noble Lord could not have intended to convey by these words that the Chelsea Company were compelled by their Act to lay down the pipes;

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(1) 10 T.L.R. 175, 259.
(2) 6 App. Cas. 193, 213.
(3) [1914] 3 K.B. 772, 781.

for, as appears by the Law Times Report, the argument of Mr. Kisch for the plaintiffs that the terms of the statute were not imperative but permissive was followed by Sir R. E. Webster who admitted that "the company "were not compelled to lay down the pipes." I think, therefore, that all that Lord Sumner meant when he said that the Legislature had "directed and required" the undertaker to do that which caused the damage was, as Sir R. E. Webster also submitted, that when once the company had laid down the pipes they were bound to keep them full of water. If this be so, and if, as in my opinion, that was the true limit of the Chelsea Company's statutory obligation, it does not differentiate that case in any way from the present; for once the defendants in the present case constructed their waterworks their duty to provide and keep a supply of pure and wholesome water in them is absolute under section 65 of the Public Health (Ireland) Act, 1878.

Although I do not deem it necessary for the purpose of this decision, I cannot conclude this judgment without saying that in my opinion the words which I have cited from Lord Watson's speech have too frequently been divorced by text book writers both from their context and from the facts of that case, and a wider meaning has, accordingly, been given to them than they were intended to bear. When the whole paragraph is carefully read and due weight is given to the noble Lord's words "in *any place* which might be selected for the purpose," I incline strongly to the view that they were only intended to apply to the second of the two cases referred to in the paragraph, namely, where the particular plan or locality for the works has not been prescribed, and that they are inapplicable to works such as those constructed by the present defendants, in which the situation of reservoir, filter basins, tanks and lines of pipes is clearly defined in deposited plans and books of reference. In support of this view as to the true meaning of Lord Watson's judgment I would only mention that, although the *Metropolitan Asylum District v. Hill* (1) was cited to the Court in *Green v. Chelsea*

(1) 6 App. Cas. 193.

Waterworks Co. (1), it was apparently distinguished, and did not affect the judgment of the Court.

The answer to the question put to us by the learned Judge will be in the negative, and we measure the costs, which he directed should in any event be paid by the defendants, at the sum of £21.

Best, L.J.

Best, L.J.: This matter comes before the Court on a case stated by Wilson, J., from the County of Down Summer Assizes, 1931.

Defendants by the Bangor (County Down) Water and Improvement Act, 1905, were authorised to make and maintain a reservoir some distance outside the town of Bangor and to carry water therefrom down to and along the Holywood to Bangor main road in a line of pipes and to distribute same for payment in the town of Bangor. Plaintiff owns and occupies a shop and premises on the south side of the main road and about one and a half miles outside the town of Bangor.

About seven o'clock, a.m., on 10th March, 1931, plaintiff discovered that his shop was surrounded, and his premises cut off from the county road, by water, and later on it was discovered that the water which caused the flood came from a burst in the line of pipes on the county road at or near his shop. Plaintiff sent a message to the defendants about eleven, a.m., informing them that a burst had occurred but there was some delay in applying a remedy, and the learned Judge has found negligence against the defendants on this head and has awarded five pounds damages in respect of such negligence.

The principal question, however, in the case and the only one for decision by this Court is whether defendants are liable for the entire damage done to plaintiff's property by the bursting of their main or waterpipe on the county road in the absence of all proof of negligence on the part of defendants, causing the damage complained of, other than the actual bursting of the pipe. Mr. McGonigal's submission for defendants is that as the Act under which they have carried out their

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(1) 10 T.L.R. 175, 259.

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undertaking contains no provision such as is to be found in some local or private Acts that nothing therein contained should exonerate the undertakers from any indictment, action or other proceeding for nuisance in the event of nuisance being caused by them, they are therefore exempt from liability for nuisance in the absence of proof of negligence on their part.

He relied strongly on the case of *Green & Anor. v. Chelsea Waterworks Co.* (1), as being an authority directly in favour of this contention. This was an appeal from a decision of Mathew, J., reported in the same volume, at p. 175. The action was brought to recover damages for injury caused to plaintiff's property by the bursting of a water main belonging to the defendants. The defence was that defendants were empowered and obliged to construct and maintain their works by certain Acts of Parliament and had been guilty of no negligence. It appears, however, from the report of the case given in 70 L.T., p. 547, that defendants were not compelled, as the word "obliged" would imply, to construct their Waterworks but were merely empowered by their Act to do so. The case was tried before Mathew, J., and a special jury, who found that the defendants were not guilty of negligence, but it was contended that the defendants were liable notwithstanding the absence of negligence. The learned Judge said that no amount of skill would have prevented the accident and the jury had decided that there had been no negligence. If Parliament had intended to impose a liability on the defendants for accidents which might occur through no fault of theirs, it would have said so. On the hearing of the appeal Counsel for the appellants contended that the defendants were liable on the principle of *Rylands v. Fletcher* (2).

Lindley, L.J., who delivered the judgment of the Court, in dealing with the argument based on the case of *Rylands v. Fletcher* (2), said that *Rylands v. Fletcher* (2) was not a case of a company authorized to lay down water pipes by Act of Parliament. It was a case of a private individual storing water in his own land for his own purposes. There was no negligence on his part but the principle of that case was stated by Lord Blackburn as follows, and he then gives the oft-quoted passage from Lord Blackburn's judgment which deals with this matter. The Lord Justice then proceeded to say that it was possible that that principle might have been applied to companies having statutory authority to make railways or carry water but the Court had declined to extend it to such cases. The same argument had been used without success in the similar case of *Dunn v. Birmingham Canal Co.* (1), where without any negligence on the part of the Company, the canal had flooded the plaintiff's mine. It was there held that the defendants were not liable expressly on the ground that the doctrine of *Rylands v. Fletcher* (2) was inapplicable to a Company which was doing what it was authorized to do by Act of Parliament. If that case (*i.e., Rylands v. Fletcher* (2)), were extended as far as strict logic might require, it would be a very oppressive decision.

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(1) 10 T.L.R. 259.
(2) L.R. 3 H.L. 330.

In answer to this and the other authorities cited by Mr. McGonigal for defendants, Mr. Beattie says that in the present case defendants are not ordered but only permitted to supply water and that their powers must be exercised in strict conformity with private rights, and that the onus of proving that the creation of a nuisance will be the inevitable result of carrying out the directions of the Legislature lies upon the persons seeking to justify the nuisance. He relies on a passage in the judgment of Lord Watson in the *Managers of the Metropolitan Asylum District v. Hill & Ors* (3), which will be found at p. 213 of the report.

Beginning at the bottom of p. 212. Lord Watson expresses the opinion that the Legislature can not be held to have sanctioned that which is a nuisance at common law except in the case where it has authorized a certain use of a specific building in a specified position, which cannot be so used without occasioning nuisance, or in the case where the particular plan or locality not being prescribed, it has imperatively directed that a building shall be provided within a certain area and so used, it being an obvious or established fact that nuisance must be the result. Then comes the passage about justifying the nuisance and how that justification is to be effected. He then proceeds :—" Where the " terms of the statute are not imperative, but per- " missive, when it is left to the discretion of the persons " empowered to determine whether the general powers " committed to them shall be put into execution or " not, I think the fair inference is that the Legislature " intended that discretion to be exercised in strict " conformity with private rights, and did not intend " to confer licence to commit nuisance in any place " which might be selected for the purpose." It is upon this part of the judgment and upon the fair inference which Lord Watson says is to be drawn that Mr. Beattie bases his argument for plaintiff. But Lord Watson is here dealing with the latter of the two cases put by him which is " the case where the " plan or locality not being prescribed, it " (the Legislature) " has imperatively directed that a building " shall be provided within a certain area and so used, " it being an obvious or established fact that nuisance " must be the result." The Managers of the Metropolitan Asylum District had a wide range of choice as to the area in which they might place their buildings, they might have chosen a site where their work could have been carried on without injury to the health or property of persons resident in the neighbourhood, but the locality selected for their Asylum was such that it became an obvious or established fact that a nuisance must be the result.

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(1) L.R. 8 Q.B. 42.
(2) L.R. 3 H.L. 330.
(3) 6 App. Cas. 193, 213.

The passage in Lord Watson's judgment on which reliance is placed by Mr. Beattie can, in my opinion, have no application to the present case, where defendants are bound, if they proceed with their scheme, to carry out their works " in the lines and situations " and upon the lands delineated upon the deposited " plans and described in the deposited book of refer- " ence." Having decided to make and maintain their works, the Urban Council, now the Borough Council, had no such choice of locality for their works as was conferred upon the Managers of the Metropolitan District.

I am accordingly of opinion that the decision of the Court of Appeal in *Green v. Chelsea Waterworks Co.* (1), is in no way affected by the passage in the judgment of Lord Watson on which Mr. Beattie relies, and that the question put to us by the learned Judge should be answered in the negative.

I desire to add that, although the argument for defendants has proceeded on the assumption that they were at liberty to make and maintain their waterworks or not as they chose, I am by no means convinced that such is the case. It appears from a recital in the Act of 1905 that the Council were authorised by the Bangor Waterworks Provisional Order, 1881, and the Bangor Waterworks Provisional Order, 1892, to construct certain waterworks for the supply of water to the district, and that they had at the date of the Act constructed the said waterworks and that the supply of water therefrom was insufficient for the requirements of the district, and it might be argued, altogether apart from the construction to be put upon the word "may" in the first line of section 5 of the Act, that the Council were bound, having regard to the provisions of section 15 of the Public Health (Ireland) Act, 1896, to remedy the insufficiency of the supply, so that they were not entirely free agents in the matter, but for the decision of the present case it is not necessary to offer any opinion on the point.

Solicitors for the plaintiff: *George McCracken & Co.*
Solicitor for the defendants: *W. I. Mahaffy.*

J. McC.

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(1) 10 T.L.R. 259.

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1931.

BUCHANAN v. DOWN COUNTY COUNCIL (1).

Nov. 10.
Dec. 10.

Malicious Injury—Claim for compensation—Damage to motor car—Malice—Grand Jury (Ireland) Act, 1836 (6 & 7 *Wm.*, 4 *c.* 116), *section* 135—*Local Government (Ireland) Act*, 1898 (61 & 62 *Vict.*, *c.* 37), *section* 5 (1)—*Malicious Damage Act*, 1861 (24 & 25 *Vict.*, *c.* 97), *section* 51—*Motor Vehicles and Road Traffic Act (Northern Ireland)*, 1930 (20 & 21 *Geo.*, 5 *c.* 24), *section* 4 (1)

B., the owner of a motor car, went upon a fishing expedition, and left his car on the road side, while he went to fish. He left his car, with the engine switched off, the gear lever in neutral, and the hand brake applied. A little more than an hour afterwards it was found 139 yards away from the point at which it had been left. There was a slight slope down from the point at which the car had been left, to the point at which it was found. When found the car was overturned and seriously damaged. The handbrake was released, the gear lever was found to be engaged in first gear, the engine switch was turned on, and the radiator was warm.

No person was found in the neighbourhood of the car, no evidence was given as to any person having been seen tampering with it, and there was no evidence of direct malice towards the owner of the car.

The owner applied for compensation for the damage done to the car, to the County Court Judge who found in his favour. The defendants appealed to the Judge of Assize who stated a case for the opinion of the Court of Appeal. The Judge of Assize was satisfied that the car had been put in motion by some human agency.

Held, by the Court of Appeal (Andrews and Best, L.JJ.), that the onus of proof lay upon the applicant, and that the facts as proved did not justify the inference that the act of putting the car in motion was malicious. It lies upon the claimant to prove affirmatively that the injuries are not accidental.

Case Stated on the hearing of a civil bill appeal for the opinion of His Majesty's Court of Appeal in Northern Ireland by Moore, L.C.J., at the County Down Summer Assizes, 1931, as follows :—

This was an Appeal by the respondents from a decree granted by the County Court Judge of Down upon the hearing of a claim for damages for malicious injury sustained by the plaintiff by reason of the alleged malicious damage to his Bentley motor car.

(1) In the Court of Appeal before Andrews and Best, L.JJ.

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I refer to the notice of application and the decree. The facts proved before me were as follows :—

David Richard Buchanan, the applicant, is a Lieutenant of the Gordon Highlanders, presently stationed at Ballykinlar Camp, and was the owner of a Bentley motor car.

On the 25th July, 1930, the applicant went upon a fishing expedition to Loughislandreavey with a brother officer named Duke. The applicant stopped his car upon the left hand side of the road facing towards Castlewellan, with the engine switched off and the gear lever in neutral, and the hand brake applied. The car was so left at about 8-20 p.m. The car was seen at 9-20 p.m. in the position in which it had been left. Soon after 9-30 p.m. the car was found 139 yards away from the point at which it had been left by the applicant. There was a slight slope down from the point at which the car was left towards the point at which the car was found. The car when found, was overturned and was upon the bank at the left hand side of the road. The hand brake was released, the gear lever was found to be engaged in first gear and the engine switch was turned on. The radiator was warm.

No person was found in the neighbourhood of the car and no evidence was given as to any person having been seen tampering with the car. There was no evidence of direct malice towards the applicant who admitted that he had always met with courtesy and friendliness in the county.

I was satisfied that the car had been put in motion by some human agency.

W. Lowry, K.C., and *Hanna*, for the applicant submitted that the mere fact that the car had been put in motion by human agency was sufficient to justify a decree.

E. S. Murphy, K.C., and *Chambers*, for the respondent, contended that the onus of proof lay upon the applicant and had not been discharged, and that the fact as proved did not justify the inference that the act of putting the car in motion was malicious.

Counsel for the respondents urged me to state a case for the opinion of the Court as to whether upon the facts as stated the applicant was entitled to a decree for malicious damage.

The question for the opinion of the Court is whether upon the foregoing facts the applicant is entitled to an award. No question was raised as to the amount of the award.

If the answer to this question be in the affirmative, the decree of the County Court Judge will be affirmed with Twenty-two pounds nine shillings costs and Five pounds witnesses' expenses in the County Court and Twenty-seven pounds fifteen shillings costs and Ten pounds witnesses' expenses on Appeal.

If the answer be in the negative, the decree of the County Court Judge will be reversed with Eleven pounds fourteen shillings costs in the County Court and Thirteen pounds ten shillings costs and One pound witnesses' expenses on Appeal.

Murphy, *K.C.* (with him *Chambers*), for the respondents :—

The onus is upon the applicant to show that the act of starting the car not only was not accidental, but was malicious. We submit that the present case is much stronger than *Woodley v. Cork County Council* (1), upon which we rely.

In section 16 of the Malicious Damage Act, 1861, the material words are "unlawfully and maliciously."

Section 4, sub-section 1 of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1930, makes taking a motor car without the owner's consent or other authority an offence. We submit that prior to the passing of that Act joy-riding was not an offence. The applicant in the present case has not established that the act of interfering with the car, if such an act took place, was unlawful within section 16 of the Malicious Damage Act, 1861. The facts proved show that what took place may have been merely fiddling with the car. It lies upon the applicant to show that it was the intention of the person who started the engine to injure the car. There was no evidence on which a prisoner could have been convicted of unlawfully and maliciously injuring the car.

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(1) [1910] 2 I.R. 29.

We rely on *Connor v. County Antrim County Council* (1). There in an application for damages for alleged malicious burning of a stack of hay, evidence was given of a number of recent burnings and other injuries to property in the neighbourhood, but no common origin was proved to have caused these injuries to property. It was held that this did not amount to sufficient evidence of malice, and that it lay upon the claimants for compensation to prove affirmatively that the injuries were not accidental.

The applicant has not proved his case.

Lowry, K.C., and *G. B. Hanna*, for the applicant :—

A mere trespass to a chattel is unlawful. Whoever did the damage to the car was a trespasser, he committed an unlawful act. It is not necessary to show that whoever committed this unlawful act could be made amenable to the criminal law If anyone has interfered with the car and damage has resulted, such a person has been guilty of a malicious and unlawful act.

In *McDowell v. Corporation of Dublin* (2), Holmes, L.J., adopted the definition of malice given by Lord Campbell in *Ferguson v. Earl of Kinnoull* (3), where he said that "malice in the legal acceptance of the "word is not confined to personal spite against in-"dividuals, but consists in the conscious violation of "the law to the prejudice of another." We rely on the words used by Holmes, L.J., in *McDowell v. Corporation of Dublin* (2) at pp. 554-555. Joy-riding which is a trespass is a violation of the criminal law. The injury to the car in the present case could not have occurred by accident. We rely on the words used by Sir James H. Campbell, L.C.J., in *Miggins v. Meath Council* (4), where he said: "There remains the

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(1) 35 I.L.T.R. 188.

(2) [1903] 2 I.R. 541, 554.

(3) 9 Cl. & F. 251, 321.

(4) 51 I.L.T.R. 114, 116.

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"question as to the proof of malice; and as to this I "am satisfied from what transpired before me in these "and several similar applications which I had to deal "with on appeal at the recent Assizes at Trim, that "the learned County Court Judge holds the view that " in these applications the onus is upon the claimant " to give evidence of express malice, somewhat in "the same way as it rests upon a plaintiff in a libel "action, when the matter complained of has been "printed and published upon a privileged occasion, and "that it is not sufficient for him merely to negative "any reasonable theory of accident. As this question "is one of general importance for claimants and county "councils throughout the country, I wish to state "explicitly that in my opinion this view of the law is "entirely erroneous, and that the applicant satisfies "the onus as to proof of malice in so far as it rests on "him once he establishes that upon no reasonable "hypothesis consistent with the facts of the case could "the injury have been the result of accident." We submit that in the present case we have excluded the possibility of accident. Further on in his judgment in *Miggins v. Meath County Council* (1), Campbell, L.C.J., said: "that in such a case as where no reasonable "theory of accident is forthcoming it seemed to him "clear that the Judge is at least entitled to draw the "inference of malice from the facts in evidence before "him: in other words, to hold that the injury resulted "from a wanton act, done without lawful excuse, and "was therefore malicious."

We submit there would be no possible defence to a prosecution by the perpetrator of the damage, who could have been prosecuted under section 51, of the Malicious Damage Act, 1851.

Woodley v. Cork County Council (2), was quite different, as in that case there was an express finding that there was no intention to injure the lands of the applicant.

Murphy, K.C., in reply:—

We rely on the words used by Fitzgibbon, L.J., in

(1) 51 I.L.T.R. 114, 116.

(2) [1910] 2 I.R. 29.

In re Burrowes (1), where he said: "This case could "not have arisen until now, because the law has been "changed by the Local Government Act, sect. 5, which "extends the right to compensation to personal "property of all kinds, with the limitation that the "injurious act must be a crime punishable on indictment under the Malicious Damage Act, 1861. It "plainly comes within that Act."

A mere trespass cannot satisfy the words of section 5 of the Local Government Act, 1898, even if the applicant succeeded in establishing that a crime had been committed, there are the words "and maliciously" to be considered. We submit that it must be shown (*a*) that the act amounted to a crime, and (*b*) that the person who committed the criminal act had the intention of injuring the property. There is no such finding. There was no malicious and unlawful act under section 51 of the Malicious Damage Act, 1861, and the applicant cannot succeed.

Cur adv. vult.

ANDREWS, L.J. Dec. 10.

ANDREWS, L.J.: The applicant, towards whom there is no evidence of direct malice, and who admitted that he had always met with courtesy and friendliness in the county, left his motor car by the roadside when he went to fish. The engine was switched off, the gear lever in neutral, and the hand brake applied. An hour afterwards it was seen uninjured in the position in which it had been left. A quarter of an hour or so later it was found 139 yards away, overturned upon the bank at the left hand side of the road, with hand brake released, engine switch on, and first gear engaged. There was a slight slope in the road from the point at which the car was left towards the point at which it was found; but this is immaterial, as the learned Lord Chief Justice, who stated the case, has held as a fact that "the car had been put in motion by some human agency." The question for our determination is whether upon the foregoing facts the applicant is entitled to compensation under the Criminal Injury code.

(1) [1900] 2 I.R. 593, 601.

It is, of course, clear that such a modern invention as a motor car was not made the subject of compensation under the Grand Jury (Ireland) Act, 1836; but section 5 (1) of the Local Government (Ireland) Act, 1898, which transferred to the County Court the business of presentment sessions and grand jury in relation to compensation for criminal injuries, declared that section 135 and the following sections of The Grand Juries Act, 1836, so far as unrepealed, should extend to the case of maliciously setting fire to, destroying or injuring property of any description, whether real or personal, provided that the Act should not extend the application of the said sections to any case except where the malicious act done was a crime punishable on indictment under the Malicious Damage Act, 1861. That Act, of course, likewise, contained no express reference to motor cars; and it is, therefore, admitted that the only section of the Act under which an indictment for malicious damage to a motor car would lie is section 51, which provides that "whosoever shall "unlawfully and maliciously commit any damage, "injury, or spoil to or upon any real or personal "property whatsoever, either of a public or private "nature, for which no punishment is hereinbefore "provided, the damage, injury or spoil being to an "amount exceeding five pounds, shall be guilty of a "misdemeanour, etc."

The applicant can, accordingly, only succeed in this case if the Court is satisfied that the damage to his car was committed "unlawfully and maliciously"; and it is not disputed that since the Local Government (Ireland) Act, 1898, came into force the onus of proof in these proceedings, which are tried by a legal tribunal, and are more in the nature of a criminal prosecution than a civil action, lies on the applicant. The Judge now discharges the functions formerly discharged by judge and jury. It is for him to be satisfied as a juror that the act was malicious. This may be done in either of two ways:—

(*a*) By direct or express evidence of malice; or
(*b*) As in ordinary cases of circumstantial evidence where it is necessary for the Crown to negative

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every reasonable inference that is consistent with innocence. (See judgment of Palles C.B., in *In re Midland Railway Co. (Ir.)* (1).)

It is not for the county to prove that the occurrence was accidental; it is for the applicant to prove it was not accidental. This onus must be discharged though it involves the proof of the negative.

Now in the present case, in which there is no direct evidence of malice, the question to be determined is, whether conviction has been brought home to our minds that the act which caused the damage to the applicant's car was unlawful and malicious. If there is an inference, reasonable and probable, consistent with its not being unlawful or malicious, we must hold that the applicant has failed to prove his case.

When once the existence of human agency is established, I have no hesitation in holding that the act of starting the car, whatever was the motive or intention of the person who did it, was an unlawful act within the section; for, if this word is to be held, as it obviously should, not to be merely redundant with the word "maliciously," it must, as stated in Moloney & Lee on Criminal Injuries, at pp. 65-66, have been inserted to exclude all cases in which the person accused of an offence has a right by virtue of his ownership. It implies a wrongful act done to the property of a person other than the lawful owner. It only remains, therefore, to consider whether the act was also malicious.

There is no necessity to go beyond the universally accepted definition of Bowen, L.J., in *Mogul S. S. Co. v. McGregor Gow & Co.* (2), where he says that "'maliciously' means and implies an intention "to do an act which is wrongful, to the detri- "ment of another." Again, at p. 613, he said:— "Intentionally to do that which is calculated in the "ordinary course of events to damage, and which "does, in fact, damage another in that other person's "property or trade, is actionable, if done without "just cause or excuse. Such intentional action, "when done without just cause or excuse, is what the "law calls a malicious wrong."

(1) 38 I.L.T.R. 52.

(2) 23 Q.B.D. 598 at p. 612.

It is elementary to say that malice refers to intention and not to motive. The importance of intention, and the essential distinction between it and motive may be illustrated by reference to a few of the decided cases. In *In re Burrowes* (1), boys, from motives of curiosity to see what was in a family mansion which had been almost entirely destroyed by fire, smashed open doors and windows and entered. One of the boys, as was found in the case, wilfully and intentionally climbed over mirrors covered by sheets; and when he unintentionally caught his foot in the sheets, he wilfully and intentionally kicked out with reckless violence to free his foot, knowing that the probable result in his struggle would be to injure the mirrors, and not caring whether he injured them or not. This finding of intention or reckless disregard of consequences entitled the applicant to recover compensation for the broken mirrors, though the motive of the original entry was mere curiosity. Again in *McDowell v. Dublin Corporation* (2), though the motive of breaking a plate glass window of a jeweller's shop was larceny, the owner was entitled to recover compensation for it, as the breaking of the window was not only unlawful, but also a wilful and intentional injury and wrong to the property of another, and therefore an act maliciously done.

Yet another illustration of the importance of establishing intention to do the alleged malicious act is *Woodley v. County Council of Cork* (3). In this case, the owner of lands set fire to the heather on his own lands at a date prohibited by statute. The fire spread to the adjoining lands of the applicant, which was held to be the natural and probable consequence of his act; but it was specifically found in the Case Stated that the owner of the lands on which the fire was first lighted had no intention of injuring the lands of the applicant. The Court of Appeal held that, though his act was illegal and unlawful, it was on the evidence not malicious, and was not, accordingly, a crime punishable on indictment under the Malicious

(1) [1900] 2 I.R. 593.
(2) [1903] 2 I.R. 541.
(3) [1910] 2. I.R. 29.

Damage Act, 1861. Whilst, in the absence of evidence to the contrary, a man is presumed to know and intend the natural and probable consequences of his own act, such presumption was rebutted by the express finding that it was not the intention of the man who lighted the fire that the applicant's lands should be burnt or injury done to them. The case was in principle precisely the same as where a man, who was fighting with others in a street, threw a stone at them, which passed over their heads and struck a large plate glass window. Though the natural consequences of his act was clearly to break the window, it was held that he could not be convicted of malicious damage, as the jury held that he threw the stone intending to strike one of the people, and not intending to break the window. *Reg. v. Pembleton* (1).

These cases are sufficient, though many more could be cited, to emphasise the absolute necessity for the existence of an intention on the part of the wrongdoer to commit the act which is alleged to be malicious; and they further establish that this intention may either be directly and conclusively proved, or may be inferred as the natural and probable consequence of the wrongdoer's act.

The obstacle which in my opinion lies in the applicant's way is the absence of any finding in the Case Stated on this question of malicious intent; and there are no surrounding circumstances, as in *Kennedy v. Minister for Finance* (2), from which this omission might be supplied. The Lord Chief Justice has merely found that the car was put in motion by some human agency. I am satisfied that the omission was not a mere oversight, especially as a draft of the Case was submitted to and approved of by both parties before signature. It was due to the inherent difficulty or impossibility of determining upon the meagre evidence available the intent of the unseen hand which started the car in motion. We do not know if it was a man, woman, boy or girl, though the starting of the engine and the engagement of the gear suggest an adult. But even if we were to exclude the mischievous or inquisitive operations of a child from the region of probable or possible causes, we are still confronted with many possibilities. The wrongdoer's intent may have been simple larceny, the injury to the car being in no sense malicious, but being caused by pure accident consequent upon the wrongdoer's inexperience in driving this type of car.

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(1) L.R. 2 C.C.R. 119. (2) [1925] 2 I.R. 195.

Whilst the ratepayers must pay for *wilful* destruction or injury to property, even when the object of the culprit is to commit larceny (Per Holmes, L.J., in *McDowell v. Corporation of Dublin* (1), it is well settled by such cases as *Lord Kenmare v. County Council of Kerry* (2), that what is a mere larceny and no more cannot be, even if malicious, a malicious injury. There must be an act of intentional injury and mischief. The short report of *Regan v. County Council of Tipperary* (3), is also instructive in illustrating when the Court may, from circumstances which were proved, infer that the act was one of intentional injury rather than of mere larceny. No such facts, however, exist in the present case.

So, also the wrongdoer's intent may have been mere joyriding, an occupation which had become so popular in certain areas of Northern Ireland that legislation was specially directed against it in the Motor Vehicles and Road Traffic Act (Northern Ireland), 1930 (section 4), which was passed into law about four months after this occurrence. Finally, it is of course possible that the intent may have been the malicious destruction of the car, but there are difficulties in the way of accepting this suggestion. In the first place, one naturally asks why should anyone wish to injure the car of a man who enjoyed universal popularity. In the next place, there is the practical difficulty of saying how the operation was carried out. It would not be an easy task to start up the car and jump from it whilst in motion ; yet, presumably, the wrongdoer would not voluntarily remain in it whilst he was engaged in deliberately trying to overturn it. It is enough to say, however, for our decision in the present

(1) [1903] 2 I.R. 541.

(2) 34 I.L.T.R. 11.

(3) 55 I.L.T.R. 80.

case that there is no finding on the question of intent; and my strong opinion further is that, when one bears in mind the reasonable possibility of such alternatives to the intent to do malicious damage as those to which I have referred, no such finding would have been justified. It cannot be too strongly emphasised that in these cases the county is not an insurer; and I have already said enough to show that the applicant has not even satisfied the test laid down by Sir Jas. H. Campbell, L.C.J., in *Miggins v. Meath County Council* (1), and so strongly relied upon by Mr. Lowry, that on no reasonable hypothesis, consistent with the facts of the case, could the injury have been the result of accident. The applicant must be held to have failed to discharge the onus of proof which the law casts upon him. The case remains one of those "unsolved mysteries," to which Palles, C.B., referred in *Re Midland Railway Co.* (*Irel.*) (2), in which according to law the applicant is not entitled to recover compensation from the county.

We allow the County Council £15 15*s.* 0*d.* costs of this Case Stated.

BEST. L.J.

BEST, L.J.: This matter comes before us on a Case Stated by the Lord Chief Justice. The applicant, an officer in the Gordon Highlanders, was the owner of a Bentley motor car, and on July 25th, 1930, went upon a fishing expedition to Loughislandreavey, with a brother officer named Duke. He stopped his car on the left hand side of the road facing towards Castlewellan in the said county, with the engine switched off and the gear box in neutral and the hand brake applied. The car was left at about 8-20 p.m. It was seen at 9-20 p.m. in the position in which it had been left and was then undamaged. Soon after 9-30 p.m. it was found one hundred and thirty-nine yards away from the point at which it had been left by the applicant. There was a slight slope down from the point at which the car had been left to the point at which it was found. When found, it was overturned and was upon the bank at the left hand side of the road. The hand brake was released, the gear lever was found to be engaged in first gear, the engine switch was turned on and the radiator was warm.

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(1) 51 I.L.T.R, 114. (2) 38 I.L.T.R. 52.

The Lord Chief Justice reports that no person was found in the neighbourhood of the car and no evidence was given as to any person having been seen tampering with the car. There was no evidence of direct malice towards the applicant, who admitted that he had always met with courtesy and friendliness in the county. The Lord Chief Justice was satisfied that the car had been put in motion by some human agency.

The learned County Court Judge had found that the applicant was entitled to the sum of One hundred and seventy-five pounds as compensation for the injuries done to the car, and from this award the County Council appealed to the Judge of Assize. The Lord Chief Justice reports that Counsel for the applicant submitted that the mere fact that the car had been put in motion by human agency was sufficient to justify the making of a decree, whilst Counsel for the respondents contended that the onus of proof lay upon the applicant, and that the facts as proved did not justify the inference that the act of putting the car in motion was malicious.

The law as to the onus of proof where application is made for compensation for malicious injury to property was clearly laid down by Chief Baron Palles in *Connor v. The County Council of the County of Antrim* (1). That was an application for damages for malicious burning of a stack of hay, and the Chief Baron says it is not necessary in these cases for the County Council to prove that the injuries are accidental. It lies on the claimant to prove affirmatively that the injuries are not accidental. If he proves that affirmatively, then, and not till then, arises the question whether they are malicious.

The onus of proof, then, being on the applicant, he must show that the act which caused the damage to his car was an unlawful and malicious act for which the person doing it could have been indicted under section 51 of The Malicious Damage Act, 1861.

(1) 35 I.L.T.R. 188.

The car was moved by human agency, and as the agent interfered with property which was not his own and as he had no authority for doing so, there seems to be little doubt about the act being unlawful.

Next, was it a malicious act ? Malice in the legal acceptation of the word, according to Lord Campbell, is not confined to personal spite against individuals, but consists in the conscious violation of the law to the prejudice of another. *Ferguson v. Earl of Kinnoull,* (1). In the words of Blackburn, J., malice may be defined to be where any person wilfully does an act injurious to another without lawful excuse. *Reg. v. Pembliton* (2).

It is necessary for the applicant to prove either directly, or facts from which it may be inferred, that there was an intention on the part of the wrongdoer to injure his property irrespective of the motive of the wrongdoer's action, and in this connection it is to be noted that a man must be taken to intend the natural and probable consequences of his acts. The principle is illustrated by the cases of *In re Burrowes* (3), the case of the boy and the mirrors ; *McDowell v. Corporation of Dublin* (4), where the thief broke a pane of glass for the purpose of stealing jewellery, and *Woodley v. The County Council of the County of Cork* (5), where a man burnt heather on his own lands and thereby set fire to the lands of the applicant, but it was found that in lighting the heather there was no intention of causing injury to the applicant.

In this case there is no direct evidence that the act complained of was malicious, nor can I find any facts proved from which such a conclusion might properly have been inferred. At any rate, the Lord Chief Justice has not drawn the inference, and he probably had the same difficulty in drawing it as I should find myself in if called upon to do so. For the person who set the car in motion may have been a person who intended to steal the car and who did not at all intend to injure it, or he may have desired to take the car

(1) 9 Cl. & F. 251, 321.
(2) L.R. 2 C.C.R. 119.
(3) [1900] 2 I.R. 593.
(4) [1903] 2 I.R. 541.
(5) [1910] 2 I.R. 29.

for a joy ride without any intention of injuring it, or he may have interfered with the car through idle curiosity and have thus set it accidentally in motion.

All these are possible ways in which the car might have been damaged without the least intention on the part of the person who started it to cause injury to it.

Mr. Lowry has argued that whoever started the car was a trespasser and was committing an unlawful act. I agree, but was his act malicious within the meaning of the Malicious Damage Code? I have already indicated my view that it is not, and I think this conclusion is in no way inconsistent with the test laid down by Sir James Campbell in *Miggins v. Meath County Council* (1), where, after stating that proof of express malice is not necessary, he says that an applicant satisfied the onus as to proof of malice in so far as it rests on him once he establishes that upon no reasonable hypothesis consistent with the facts of the case could the injury have been the result of accident.

Upon at least one reasonable hypothesis consistent with the facts of this case the injury could have been caused accidentally, and accordingly the applicant has not discharged the onus resting upon him, and is therefore in my opinion not entitled to an award.

Solicitors for the applicant: *White, McMillan & Wheeler.*

Solicitor for the respondent: *William Martin.*

J. McC.

(1) 51 I.L.T.R. 115.

DOSSOR v. MONAGHAN AND OTHERS (1).

Ch.D.
1931.

Dec. 1.

(1931. No. 174.)

Restraint of trade—Agreement by musicians not to enter into any engagement within certain areas after termination of their employment—Reasonableness of restriction.

The defendants entered into contracts of employment as members of the plaintiff's orchestra, one of the terms of which was that they should not, within three years from the termination of such employment, enter into any similar engagements within fifty miles of Great Yarmouth, Redcar, Southport, New Brighton, or Belfast, these being towns in which the defendants had previously played under the plaintiff's direction.

While the defendants were playing as members of the plaintiff's orchestra in a restaurant in Belfast, the plaintiff terminated their employment and they thereupon entered into an engagement with the proprietor of the same restaurant to play there on their own account.

Pending the hearing of the action the plaintiff moved for an interlocutory injunction to restrain the defendants from playing in the said restaurant in breach of the contracts aforesaid.

Held, that the contracts were in undue restraint of trade and that the plaintiff was not entitled to an interim injunction.

MOTION for interlocutory injunction.

On 20th September, 1928, the defendants entered into agreements with the plaintiff to play in an orchestra under his direction. These agreements, which were made at New Brighton, in Cheshire, were for a period of one year, the plaintiff having an option to renew the contracts for a further period of one year, and a right to terminate the engagement on giving 14 days notice. Each of the agreements contained the following undertaking on the part of the defendants, viz.:—"Not to enter into any future engagements "within fifty miles of Great Yarmouth, Redcar, "Southport, New Brighton or Belfast, for at least "three years from the termination of this agreement."

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(1) In the Chancery Division before Best, L.J., sitting for Wilson, J.

The defendants had previously played at the places mentioned, under the plaintiff's direction.

In the month of September, 1929, the contracts were extended for a further period of one year and accordingly expired in September, 1930, but the defendants continued in the plaintiff's employment, playing as members of his orchestra at the Carlton Restaurant, Belfast, until March, 1931, when the plaintiff dismissed them. The defendants thereupon entered into an arrangement with the proprietor of the Carlton Restaurant and continued to play there.

Pending the hearing of an action for an injunction and damages, the plaintiff brought the present motion for an interlocutory injunction to restrain the defendants from continuing their engagement in the Carlton Restaurant in breach of the agreements aforesaid.

Warnock for the plaintiff :

Although contracts in restraint of trade are looked upon with suspicion, if the restriction is reasonable, in reference to the interests of the parties concerned, and in reference to the interest of the public, it will be enforced ; *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co., Ltd.* (1). The restriction imposed by the agreements in the present case clearly comes within this exception to the general rule.

[He also referred to *Underwood & Son, Ltd. v. Barker* (2), and *Badische Anlin and Soda Fabrik v. Schott Segner & Company* (3).]

Chambers for the defendants :

A covenant exacted by an employer in restraint of competition *per se* will not be enforced : *Morris v. Saxelby* (4). The plaintiff must show that the restriction which he is seeking to impose upon the defendants goes no further than is reasonably necessary for his protection : *Manson v. Provident Clothing and Supply Company, Ltd.* (5). Unless he can do so he is not entitled to succeed.

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(1) [1894] A.C. 535 at p. 565.

(2) [1899] 1 Ch. 300.

(3) [1892] 3 Ch. 447.

(4) [1916] 1 A.C. 688.

(5) [1913] A.C. 733.

There is no reported decision in which the Courts have granted an interim injunction which would result in precluding a person from earning his livelihood.

[He referred to *Hepworth Manufacturing Company, Ltd.* v. *Ryott* (1), and *English Hop Growers, Ltd. v. Dering* (2).]

Best, L.J.

Best, L.J. : In this case the plaintiff, Albert Edward Dossor, seeks an interlocutory injunction to restrain the defendants from playing in the orchestra at the Carlton Restaurant, Belfast. The defendants are alleged to have broken certain agreements which they entered into with the plaintiff on 20th September, 1928. [His Lordship read the material portions of the agreements.] The plaintiff claims to be entitled to the relief which he is seeking, on the ground that there has been an infringement of the clause which is intended to preclude the defendants from entering into any similar engagements within a radius of fifty miles from Great Yarmouth, Redcar, Southport, New Brighton or Belfast, for a period of three years from the termination of the agreements. In the month of September, 1929, the agreements were extended for a further year and consequently expired in September, 1930, but the defendants continued in the plaintiff's employment, playing as members of his orchestra at the Carleton Restaurant, Belfast, until the month of March, 1931. Upon the termination of this employment, they entered into an agreement with the manager of the same restaurant and continued to play there on their own account. I am now asked to grant an interlocutory injunction on the ground that the plaintiff's rights under the agreements have been infringed. I am not satisfied, however, that having regard to all the circumstances, the contracts were reasonable. In my view they go further than was reasonably necessary for the plaintiff's protection. I accordingly refuse the motion with costs.

Solicitors for plaintiff : *McKinty & Wright.*
Solicitor for defendants : *Austin D. Campbell.*

J. D. C.

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(1) [1920] 1 Ch. 1. (2) [1928] 2 K.B. 174.

K.B.D.
1932.

Feb. 5.

McLEAN v. SCOTT (1).
HOWARTH v. SCOTT.

Practice—Consolidation—Two actions for negligence arising out of same accident—Plea of contributory negligence in one action—Whether such actions should be tried together as one action.—R.S.C., 1905, *Order* 49, *r.* 9.

Two actions for negligence arising out of a motor accident were brought against the defendant. The plaintiff in the first action claimed damages in respect of the death of her husband, who was driving a motor cycle combination with which the defendant's motor lorry collided. The plaintiff in the second action claimed damages for injuries which he sustained while travelling as a passenger in the side-car of the deceased's machine on the same occasion.

The defence in the first action contained a plea of contributory negligence on the part of the deceased, but there was no plea of contributory negligence in the second action.

A motion brought by the defendant for an order that both actions should be tried together as one action was refused.

MOTION.

Two actions were brought against the defendant, William Scott, arising out of a collision between a motor lorry driven by the defendant and a motor cycle combination, which occurred at Ballyloughan, County Down, on the 21st August, 1931.

The first action was brought by Mary Letitia McLean under the Fatal Accidents Act, 1896, in respect of the death of her husband, John McLean, who was driving the motor cycle when the accident took place, and died as the result of the injuries he sustained. The second action was brought by Alfred Howarth, who was a passenger in the side-car of the motor cycle and sustained personal injuries.

The defence in the first action contained a plea of contributory negligence on the part of John McLean, while the defence in the second action contained no plea of contributory negligence.

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(1) In the King's Bench Division before Brown, J.

The defendant brought the present motion under Order 49, rule 9, for an order that both actions should be tried together as one action with separate issues as to damages.

In an affidavit filed on behalf of the plaintiffs it was stated that there was reason to believe that it would be alleged at the trial that John McLean was under the influence of alcohol at the time of the accident.

Lowry, K.C. (with him *Copeland*) for the defendant :

Both plaintiffs are represented by the same solicitor and the same witnesses will be called in both actions. The plaintiffs cannot be prejudiced by a common trial. The fact that the issue of contributory negligence only arises in the first action can readily be explained to the jury and need not give rise to any confusion. It would be unjust and unnecessary that the defendant should be required to defend the two actions separately.

Condy for the plaintiffs :—

The plaintiffs should not be compelled to litigate together in a common action when the issues involved are different. There is no reported case in which actions involving contributory negligence by the driver of a motor vehicle, though not by his passenger, have been ordered to be tried together. It is clear on reading the judgment in *Brady v. McDonald* (1) that Andrews, L.J., took the view that in such circumstances the Court would not order the actions to be tried concurrently.

The fact that there is reason to anticipate an allegation that the driver of the motor cycle was intoxicated is an additional ground for separate trials.

[He also referred to *Malone and Others v. Great Northern Railway Company* (*Ireland*), (2).]

Brown, J.

Brown, J. : In the first of these two actions contributory negligence is pleaded. The plaintiff in the second action is not, however, faced by any such plea and having regard to all the circumstances I do not feel that his action should, without his consent, be identified with one in which this issue is raised. Accordingly I refuse the motion with costs.

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(1) [1931] N.I. 157 at p. 160. (2) [1931] I.R. 1.

Solicitors for the defendant: *C. & H. Jefferson.*

Solicitor for the plaintiffs: *James Boston.*

J. D. C.

IN RE HAY, DECEASED; LEECH v. HAY (1).

Ch.Div.
1932.

Feb. 8, 23.

Will—Construction—Limitation in default of appointment depending on prior limitation which fails for remoteness—Whether void.

The principle that a limitation depending or expectant upon a prior limitation, which is void for remoteness, is invalid, does not necessarily apply to limitations in default of appointment.

The testator by his will devised a portion of his estate upon trust, after the death of his wife (which happened), to pay the rents and profits thereof in certain shares to five of his children, Francis, Joseph, Grace, Jane and Margaret during their respective lives, with powers of appointment and gifts over in default of appointment as therein mentioned. The testator directed that from and after the death of the survivor of his said five children, his trustees should hold the shares of any of them, which might remain unappointed by will, for his sons, James and William Thomas jointly for life, and after the death of the survivor, for the first son of Francis for life, and after his death, for such of his children, grandchildren, brothers, sisters, nephews and neices as he should by his last will appoint, and in default of appointment, for the second and every other son of the said Francis, severally, according to their respective seniorities with limitations and powers of appointment similar to those given to the first son of Francis. Then followed the words: "and in default of the same then for the first and every "other son of the said Joseph successively according to their "respective seniorities in like manner and with like limitations and "power of appointment as is hereby given to the first and other sons of Francis." Similar provisions were made in favour of the first and every other son of the testator's sons and daughters, James, William Thomas, Grace, Jane and Margaret, all of which provisions were introduced by the words:—"and in default," while the ultimate limitation was expressed in the words:—"in default for my own right heirs for ever."

The testator's last surviving son was William Thomas, who prior to his death, was entitled to a life interest in the shares of Francis and Margaret, both of whom died without issue and without having exercised the powers of appointment given to them by the will.

The question for determination was as to who was entitled, on the death of William Thomas, to the shares of Francis and Margaret.

The claimants were Edward Norman, the only son of the testator's son Joseph, and appointee under his will of all his (Joseph's) interest under the will of the testator, and Edward James, the

(1) In the Chancery Division before Andrews, L.J. (sitting as Chancery Judge).

only son of the testator's eldest son, James, who claimed to be entitled under an alleged intestacy. Both claimants were born during the lifetime of the testator.

It was admitted that the gift over which immediately followed the life estate to the first son of the testator's son, Francis (or, as there was no such son, the gift which in the events which happened, immediately followed the life estate of William Thomas) offended against the rule against perpetuities and was void.

It was argued on behalf of Edward Norman that he was entitled to a life estate under the immediately succeeding gift in favour of "the first and every other son of Joseph."

On behalf of Edward James it was contended that, as the limitation in favour of the children of the first son was void, all ulterior limitations were also void. It was thus submitted that an intestacy arose upon the death of William Thomas, the last tenant for life, and that the interest in question thereupon passed to the heir-at-law of the testator, namely, his eldest son, James, who had by his will appointed all his estate and interest in the lands to his only son, the said Edward James.

Held, that the gift over in default of appointment by Francis took effect independently of the preceding power and was consequently valid; and that Edward Norman was, accordingly, entitled to the interest which he claimed.

CONSTRUCTION SUMMONS.

[The following statement of the facts is taken from the judgment of Andrews, L.J.]

By his will, dated 31st March, 1888, Edward Hay, late of Coleraine, Coachbuilder, appointed his sons, James, Francis, and Joseph, executors and trustees thereof, and made certain specific bequests therein appearing. He further devised and bequeathed unto and to the use of his trustees their heirs executors and administrators, according to the tenure thereof, all the rest of his property, real and personal, upon the trusts thereinafter set forth. Such trusts included the sale and conversion of portion of his property for payment of debts, funeral and testamentary expenses and legacies, and, "as to such portions of his property "as consist (*inter alia*) of realty or chattel real and "remain unsold, to receive the rents and profits of the "same, and after payment of outgoings, to pay the "balance of the said rents and profits to his wife "during her life for her sole and separate use." Then followed certain immaterial trusts in reference to specifically mentioned property; and, finally, "as to "his estate of Flowerfield after the death of his wife "during the lives of his children, Francis, Joseph, "Grace Taylor, Jane and Margaret Anne Wray and "the survivor of them, upon trust to receive the "rents and profits thereof, and, after payment of "outgoings, to divide the same annually into one "hundred parts and pay certain of said parts to each "of his said five children during their respective "lives" with powers of appointment and gifts over in default of appointment as therein mentioned; and from and after the death of the survivor of the said five children to hold the shares of them or any of them, which should remain unappointed by will in manner aforesaid, or any part thereof, for his sons James and William Thomas jointly for life, and after the death of the survivor of James and William Thomas, for the first son of Francis for life, and after his death for such of his children, grandchildren, brothers, sisters, nephews, and nieces as he should by his last will and testament appoint, and in default of appointment for the second and every other son of the said Francis severally according to their seniorities with like limitations and like powers of appointment as thereinbefore given to the first son of Francis. Then followed the words:—"and in default of the same then for the first and every "other son of the said Joseph successively according "to their respective seniorities in like manner and "with like limitations and power of appointment as "is hereby given to the first and other sons of Francis." Similar provisions followed successively in favour of the first and every other son of the testator's sons and daughters, James, William Thomas, Grace Taylor, Jane and Margaret Anne Wray, all of which provisions were introduced with the words "and in "default"; and the ultimate provision was expressed in the words "in default for my own right heirs for ever."

The testator died on 5th May, 1890, and probate was granted to his said sons Francis and Joseph on 4th March, 1891. The testator's widow, the first tenant for life of the residuary estate, was dead, and the testator's last surviving child, William Thomas, died on 27th August, 1931. Prior to his death William Thomas was entitled to a life interest in the shares of Francis and Margaret Anne, as they had died on 14th September, 1900, and 4th September, 1914, respectively, the former unmarried and intestate, the latter leaving a husband but no child, and having made a will, which, it was admitted, did not operate as an appointment of her shares in Flowerfield under the power in that behalf contained in the will of the testator, Edward Hay.

The plaintiff, as trustee of the will, brought the present proceedings for the determination of the question as to who was entitled, in the events which had happened, to the shares of Francis and Margaret Anne.

The claimants were :—

Edward Norman Hay, the only son of the testator's son, Joseph, and appointee under his will of all his (Joseph's) interest under the will of the testator, Edward Hay.

Edward James Hay, the only son of the testator's eldest son, James, and appointee under his will of all his (James's) interest in the lands.

Both claimants had been born during the lifetime of the testator.

It was admitted that the gift over which immediately followed the life estate given by the will to the first son of the testator's son Francis (or, as there was no such son, the gift which, in the events which happened, immediately followed the life estate of William Thomas) offended against the rule against perpetuities and was void.

Begley, K.C., for the plaintiff :—

McGonigal, K.C., for the defendant Edward Norman Hay :—

Edward Norman Hay is entitled under the gift in favour of "the first and every other son of Joseph." The words "in default of the same," which introduce this gift, mean "in default of Francis having sons to "take under the preceding devise," which event happened.

Edward Norman Hay was born during the lifetime of the testator and was thus, when the will became operative, ready to take his interest as and when it fell into possession, without displacing any prior estate. This interest (unlike the gift to the first son of Francis) is accordingly a remainder and not an executory devise. It was decided in *Evers v. Challis* (1) that while a gift over may as to one alternative operate as an executory devise, it will not necessarily do so as to another; and if the second is that which in fact occurs, the gift may be treated as a good contingent remainder.

[He also referred to *Hancock v. Watson* (2).]

Chambers for the defendant Edward James Hay :—

Where a gift is void for remoteness, all limitations ulterior to and dependent on such remote gift are also void, though the object of the prior gift should never come into existence. *Proctor v. Bishop of Bath and Wells* (3). If once the chain is broken all ulterior limitations must also be void. In the present case there is an admitted failure of the limitation in favour of the children, etc., of the first son of Francis. Consequently the succeeding gift to those claiming as sons or descendants of Joseph is also void. This latter gift being one of a series of gifts, all of which are interdependent, is executory.

The words "in default of the same" mean "in "default of the exercise of the power of appointment "conferred upon the first and other sons of Francis," and the words "in default" introducing the subsequent limitations have a similar meaning.

If as is contended, these subsequent limitations are void, an intestacy arose on the death of William Thomas in regard to the shares in question. They accordingly passed to the heir-at-law of the testator, Edward Hay, namely, his eldest son, James, under

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(1) 7 H.L. Cas. 531.

(2) [1902] A.C. 14.

(3) 2 H. Bl. 358.

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whose will all his estate and interest in the lands was appointed to his son, Edward James Hay.

[He also referred to *Re Mortimer ; Gray v. Gray* (1) and *Re Hewitt's Settlement* (2).]

Cur adv. vult.

ANDREWS, L.J.

Feb. 23.

ANDREWS, L.J. : [His Lordship, having stated the facts and summarised the arguments proceeded] :—

The case has given me a considerable amount of anxiety, as the relevant authorities do not appear to be wholly free from conflict, and the decisions depend in so many cases upon the particular phraseology employed by the testator. The view which I have formed, however, renders it unnecessary for me to refer to the greater part of the authority cited by Counsel or perused by me.

Upon the question of the construction of the words "and in default of the same," which introduce the limitations in favour of the first and every other son of Joseph, I am of opinion that Mr. Chambers' submission is the correct one, and that their true meaning is "in default of the exercise of the power of appoint-"ment" which was conferred in the immediately preceding line of the will. Not only does it seem unnatural in finding a subject matter for the words "of the same" to refer back, as Mr. McGonigal contends we should do, to certain selected objects named in practically the opening words of the preceding clause, namely, the sons of Francis, but also any construction which did not make the words "in "default of the same" relate to the immediately preceding power of appointment, would leave unprovided for, if the limitations had been, as the testator assumed they were, valid, the contingency of there being objects of the power but no appointment. The Court is always slow, especially in the case of such series of limitations as are before us in this will, to put such a construction upon ambiguous words as would create an intestacy.

To this extent, therefore, I agree with Mr. Chambers' argument, but I differ from him in the conclusions which he asks me to draw. *Proctor v. Bishop of Bath and Wells* (1), and many other cases which could be cited, amply support the proposition to be found in Jarman on Wills, 7th Ed. 324, that, where a gift is void for remoteness, all limitations ulterior to and dependent on such remote gift are also void ; but on page 326 the learned editors also rightly lay it down that a limitation following one which is too remote may be good, if it can take effect independently of the void limitation. Now in my opinion a gift over in default of appointment does take effect independently of the preceding power, and it may, accordingly, be good though the power itself be bad for remoteness. Other text books express the same clear view in unhesitating manner. Thus in Theobald on Wills, 7th Ed. 605, the learned editors, after pointing out that limitations following as remainders upon limitations void for perpetuity are themselves void, whether within the line of perpetuity or not, proceed immediately to add :—" But where a " power of appointment is given to arise upon an event " beyond the limits of perpetuity a gift in default of " appointment is valid." The reason assigned for the difference in the law applicable to the two cases is both clear and authoritative, namely, that in the former class of cases the remaindermen are only intended to take if there is no one to take under the prior limitations ; in the latter, the gift in default of appointment is intended to take effect unless displaced by a valid exercise of the power. Finally, the same view is shortly expressed in Halsbury, vol. 22, 360, where it is stated that " the fact that a power may be exercised " in a manner contrary to the rule does not affect a " gift in default of appointment which takes effect " unless it is itself obnoxious to the rule against " perpetuities. This is so because until the power is " exercised the property remains vested in those who " take in default of appointment."

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(1) [1905] 2 Ch. 502. (2) [1915] 1 Ch. 228.

Such unanimity of opinion would not, of course, exist without ample authority to support it. Two cases are specially in point, *Webb v. Sadler* (2), and

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(1) 2 H. Bl. 358.

(2) L.R. 1 Ch. 419.

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In re Abbott, Peacock v. Frigout (1). The former is a decision of Lord Selborne, L.C., and James and Mellish, L.JJ.; the latter is a considered judgment of Stirling, J. I do not propose to examine them in detail, as the grounds and effect of the decisions are embodied in the passages from the text books which I have cited. Both cases in my opinion support the view that the principle that a limitation, depending or expectant upon a prior limitation which is void for remoteness, is invalid, does not necessarily apply to limitations in default of appointment, as in most cases of such limitations the intention is that they should take effect independently of and unless displaced by a valid exercise of the preceding power of appointment.

This is, in my opinion, the true view in the present case. The testator intended that after the death of the survivor of his sons James and William Thomas the unappointed shares of his children Grace Taylor, Jane, Margaret Anne, Francis and Joseph should pass to the first, second and other sons of Francis, and afterwards to the first and every other son of Joseph unless displaced by the exercise of the powers of appointment which were invalid for remoteness. I therefore hold that on the true construction of the will of the testator and in the events which have happened, Edward Norman Hay is entitled to a life interest in the twelve one hundredths shares of Margaret Anne Wray and of Francis Hay respectively, and I answer questions 2 and 3 of the summons accordingly. All parties are entitled to their costs out of the estate.

Solicitors for the plaintiff: *Crookshank, Leech & Moon.*

Solicitors for the defendant, Edward Norman Hay: *Cunningham & Dickey.*

Solicitors for the defendant: Edward James Hay: *Anderson & Co.*

J. D. C.

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(1) [1893] 1 Ch. 54.

IN THE MATTER OF THE FOREGLEN CO-OPERATIVE AGRICULTURAL SOCIETY, LIMITED. (No. 2.) (1).

Ch.D.
1932.

Mar. 3.

Practice—Costs—Taxation—Lodgment of numerous notices of similar nature for transmission through Notice Office—Such notices all lodged on same occasion—Charge for lodgment thereof—Discretion of Taxing Master—R.S.C. 1905, *Order* 65, *rr.* 19, 21 *and* 65 *sub-r.* 38 ; *Appendix S., No.* 155.

In the winding up of a company under order of the Court it became necessary to serve notices upon one hundred and seventeen contributories of the company. The notices, all of which were of a similar nature, were lodged for transmission through the Notice Office, at one and the same time.

Held, that under Order 65, rule 21 of R.S.C. 1905, the solicitors for the Official Liquidator were entitled on taxation to be allowed the full lower scale fee specified in Appendix S., Part 1 (item No. 155) in respect of the lodgment of each notice, and that the Taxing Master had no discretion under Order 65, rule 65, sub-r. 38, to reduce this charge.

Motion to review taxation.

The Foreglen Co-operative Agricultural Society, Limited, was wound up under Order of the Court. In the course of the winding up it became necessary for the Official Liquidator to serve notices upon one hundred and seventeen contributories of the Society. These notices, all of which were of a similar nature, were lodged for transmission through the Notice Office at one and the same time. The Solicitor for the Official Liquidator claimed to be entitled under R.S.C. Order 65, rule 21, to the full lower scale fee prescribed by Appendix S., in respect of the lodgment of each notice.

Order 65, rule 21, provides as follows :—

"In all causes and matters commenced before or "after these rules come into operation, solicitors "shall be entitled to charge and be allowed the fees "set forth in the column headed 'Lower Scale' in "Appendix S. Part 1. . . ." The fee prescribed, Appendix S. Part 1 (item No. 155), in respect of lodgment of notices for transmission through the Notice Office is ten shillings.

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(1) In the Chancery Division before Megaw, J.

The Taxing Master considered that he had a discretion under Order 65, rule 65, sub-r. 38, to reduce the charges prescribed in Appendix S.

This sub-r. provides as follows :—

"As to all fees and allowances not comprised in the "last preceding Regulation, it shall be in the discretion "of the Taxing Master to disallow the same in whole "or in part, subject nevertheless to review under "Rule 66 of this Order."

The Taxing Master accordingly allowed a bulk fee of Five Pounds to cover the lodgment of the one hundred and seventeen notices.

The Official Liquidator moved to review the taxation. The motion was opposed by the Northern Bank, Limited, who had a substantial interest in the assets of the Society.

Murphy, K.C., Pringle, K.C., and MacDermott for the Official Liquidator :—

Order 65, rule 21, provides that the solicitor is entitled to charge the lower scale fees prescribed by Appendix S., Part 1. These are minimum charges and sub-r. 38 of rule 65 does not give the Taxing Master any jurisdiction to diminish them. If the construction which the Taxing Master placed upon sub-r. 38 were correct, the effect would be that he would have a general discretion over all fees in Appendix S. There are numerous items in this Appendix relating to the preparation of documents, in respect of which there are express provisions entitling the solicitor at his option to charge for such work on a folio basis. The presence of such provisions cannot be reconciled with the proposition that the Taxing Master has a general discretion by virtue of sub-r. 38 to reduce the charges in the Appendix.

Section 61 of the Judicature Act (Ireland), 1877, provides in making Rules of Court in pursuance of that Act, regard shall be had to the Rules in force in England. This governing principle must be borne in mind in construing rules relating to costs. It has been decided that the Taxing Master has no general discretion to reduce the lower scale fees in the corresponding Appendix in the English Rules. *Price v. Clinton* (1). [They also referred to *In re Ermen, Tatham v. Ermen* (2) and *Heron, deceased, Higgin v. McMorland* (3).]

McCoy for the Northern Bank, Limited.

The only possible construction which one can place on sub-r. 38 is that the Taxing Master is thereby given a discretion to reduce the fees prescribed by Appendix S. Some of the sub-rules of Order 65 give the Taxing Master a particular discretion over costs and the object of sub-r. 38 is to give him a general discretion over those not covered by such sub-rules.

MEGAW, J.

MEGAW, J.: This application turns upon the construction of R. S. C. Order 65, rule 65, sub-rr. 37 and 38.

[His Lordship read the two sub-rr. mentioned.]

By rule 21 of the same Order solicitors are entitled to charge and be allowed the fees set forth in Appendix S., part I. Sub-r. 37 deals with fees which are in the discretion of the Taxing Master while sub-r. 38 provides that it shall be in the discretion of the Taxing Master to disallow, in whole or in part, any fees not comprised in sub-r. 37. The question is whether or not his discretion extends to the fees in Appendix S., Part I., aforesaid.

I have formed too clear an opinion to consider it necessary to reserve judgment. Mr. McCoy for the Northern Bank, Limited, opposing the objections, admits that if the construction for which he contends is to prevail, the effect would be to bring all the fees in Appendix S. under the discretion of the Taxing Master who could render this Appendix nugatory. If such were the proper interpretation to be adopted, I fail to see why there should be such elaborate provisions made as are contained in sub-rr. 1, 3, 4 and 9 of rule 65.

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(1) [1906] 2 Ch. 487.
(2) [1903] 2 Ch. 156.
(3) 28 I.L.T. 66.

Ch.D. 1932.

IN THE MATTER OF THE FOREGLEN CO-OPERATIVE AGRICULTURAL SOCIETY, LIMITED (No. 2).

MEGAW, J.

Whatever may be the proper interpretation of sub-r. 38, I am satisfied that it does not confer any discretion on the Taxing Master to reduce the fees set out in Appendix S. This being so, his ruling must be discharged.

Solicitors for the Official Liquidator: *Caldwell & Robinson.*

Solicitors for the Northern Bank, Limited: *John G. H. Wilson & Co.*

J. D. C.

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CHARITY—*Gift to widows of persons resident on estate for five years—Private Benevolence — Absence of general charitable intention—Perpetual Trust —Cy-près.* The testator, having erected six houses for the residence of six widows who had been the wives of persons who had resided for five years on the F. estates, and demised to trustees a yearly rent charge of £70 a year, charged on the townland of D., and directed them to apply the sum of £10 a year in repairing and improving the six houses, and to pay the remaining sum of £60 a year in six equal shares of £10 each to such six widows during their widowhood. He further directed that the person or persons seized of his real estate under the limitations in his will should have the sole and exclusive control of this charity, and should not be subject to the control of the Commissioners of Charitable Donations and Bequests or any other persons, but should have full power and authority when the houses should become vacant to select such widows qualified as already stated to inhabit the houses and receive the annual pension provided. The townland of D. was sold to the tenants under the provisions of the Land Purchase (Ireland) Acts, and a sum of £2,000 was retained in Court to secure the redemption of the rent charge. For many years past there has been a lack of qualified applicants for the occupation of the six houses and since 1913 only two of them have been occupied and the annuities of £10 have been paid only to the occupiers of such of the houses as were occupied. *Held*, by the Court of Appeal (Moore, L.C.J., Andrews and Best, L.JJ.) affirming Wilson, J., that the trust was not charitable. Per Andrews, L.J., (*a*) the codicil contained no evidence whatever of any general charitable intention and therefore the residue of the rent charge not now required by the widows named in the codicil should not be administered *cy-près*; (*b*) Once there is established and in operation a perpetual charitable trust, then the trust property remains always charitable, and funds subject to such charity cannot revert to the donor or his representatives. *Attorney-General for Northern Ireland v. Forde.*
[Ch. D., C.A. 1.

COMPANY—WINDING UP—MISFEASANCE — DIRECTORS AND AUDITOR — *Duties—Giving improper guarantees—Paying dividends out of capital—Failure to prepare proper balance sheets—Failure on part of auditor to audit and report on balance sheets—Wilful act or default—Directors' and auditors' liability—Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69) *ss.* 26, 113. In the winding up of the F. Company, under order of the Court, an investigation of its affairs disclosed:—(*a*) that its liabilities included a large sum due on foot of guarantees given in respect of the debts of the C. Company, in which the F. Company owned all the shares, some of which guarantees had been given when the C. Company was insolvent. (*b*) that in several years in the course of which the F. Company incurred losses, substantial sums were withdrawn from the amount standing to the credit of the reserve fund and utilised for the purpose of paying the dividends on the preference shares of the Company, the holders of which were not entitled under the Articles of Association to attend the general meetings of the Company so long as such dividends were paid. (c) that a large sum, spent by the F. Company on advertising, was not charged against profits but that the amount so expended was carried forward as an asset in the accounts of the Company. (d) that the auditor of the F. Company, who also acted as its accountant and registrar, prepared the Company's balance sheets, but these did not contain a report as required by Section 113, sub-s. 3 of the Companies (Consolidation) Act, 1908, nor was report made to the shareholders as required by sub-s. 2 of this section. Summarized balance sheets were, however, sent by the auditor to the Registrar of Companies and these bore the words "Audited Henry Jenkinson." On a misfeasance summons under section 215 of the Companies (Consolidation) Act, 1908, the official liquidator sought to make the respondent directors and the auditor liable to make good the sums paid as dividends on the preference shares as aforesaid, and also the amount payable on foot of the guarantees and other accommodation given to the C. Company. The grounds upon which this relief was claimed were that the preference dividends had been paid out of capital and that the liability in respect of the guarantees had been incurred on the basis that the balance sheets of the Company were accurate statements of the financial position, while the same were, to the knowledge of the directors and the auditor, false and misleading. The Articles of Association of the F. Company provided that neither directors nor auditor should be liable for any loss or damage unless the same should happen through his own wilful act or default. Two of the directors impugned stated that they left the finances of the Company entirely in the hands of the third director and the auditor. *Held*, that the failure to have proper balance sheets prepared, and the giving of guarantees and other accommodation to the C. Company, and the payment of the preference dividends as aforesaid were wilful acts or defaults on the part of all the directors and that they were accordingly liable to make good the amount payable on foot of the guarantees and other accommodation given to the C. Company, and also to replace the amounts paid as preference dividends. And *Held*, that the failure to audit and report on the balance sheets of the Company, and the sending of summaries purporting to be audited to the Registrar of Companies, were wilful acts or defaults on the part of the auditor, and that he was also liable to make good certain sums paid as preference dividends as a result of such default. *In re John Fulton & Co., Ltd.* [Ch. D. 35

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ESTOPPEL—*Transfer of business—No change in name of Firm—No Notice of Tranfer—Business carried on in apparently the same manner and by the same persons.* The plaintiff sued the defendant for £278 2*s.* 7*d.*, the price of goods sold and delivered. For several years the plaintiff had sold to the defendant tailoring materials. The defendant carried on a tailoring business trading as T. S. & Son. The defendant by deed in 1925 assigned the premises in which he was carrying on his business to E. S. and G. S., who continued to trade as tailors under the name of T. S. & Son. No assignment in writing was made of the business or of the debts due to the defendant, and no notice of the assignment of the premises or of any change in the ownership of the business was given to plaintiff. Defendant came to the place of business after the transfer and appeared to act in relation to the business in the same way as he had done before the transfer took place. The action was tried before Moore, L.C.J., and a special jury. The jury found (*a*) that the plaintiff supplied the goods and paid the monies sued for in the belief that there was no change in the business after 1925, (*b*) that the defendant did not intend the plaintiffs so to believe, but that his presence on the premises led them to believe so, (*c*) that in all the circumstances it was reasonable for the plaintiff so to believe and to act, (*d*) that there was a real change in the business transferring it from T. S. in 1925. On the jury's findings the Trial Judge abstained from giving judgment for either party, and left the parties to move for judgment. Both the plaintiff and the defendant applied to the Court of Appeal for judgment, or alternatively, for a new trial. *Held*, by the Court of Appeal (Andrews and Best, L.JJ.) that the defendant was estopped from denying that at the time the goods whose price was sued for were sold and delivered, he was not the owner of the business and that the plaintiff was entitled to judgment.
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MALICIOUS INJURY—Claim for compensation—*Damage to motor car—Malice—Grand Jury (Ireland) Act,* 1836 (6 & 7 *Wm.* 4 c. 116), *section* 135—*Local Government (Ireland) Act,* 1898 (61 & 62 *Vict.*, c. 37), *section* 5 (1)—*Malicious Damage Act,* 1861 (24 & 25 *Vict.*, c. 97), *section* 51—*Motor Vehicles and Road Traffic Act (Northern Ireland),* 1930 (20 & 21 *Geo.* 5 c. 24), *section* 4 (1). B., the owner of a motor car, went upon a fishing expedition, and left his car on the road side, while he went to fish. He left his car, with the engine switched off, the gear lever in neutral, and the hand brake applied. A little more than an hour afterwards it was found 139 yards away from the point at which it had been left. There was a slight slope down from the point at which the car had been left, to the point at which it was found. When found the car was overturned and seriously damaged. The handbrake was released, the gear lever was found to be engaged in first gear, the engine switch was turned on, and the radiator was warm. No person was found in the neighbourhood of the car, no evidence was given as to any person having been seen tampering with it, and there was no evidence of direct malice towards the owner of the car. The owner applied for compensation for the damage done to the car, to the County Court Judge who found in his favour. The defendants appealed to the Judge of Assize who stated a case for the opinion of the Court of Appeal. The Judge of Assize was satisfied that the car had been put in motion by some human agency. *Held*, by the Court of Appeal (Andrews and Best, L.JJ.), that the onus of proof lay upon the applicant, and that the facts as proved did not justify the inference that the act of putting the car in motion was malicious. It lies upon the claimant to prove affirmatively that the injuries are not accidental. *Buchanan v. Down Co. Co.*
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NEGLIGENCE—Contributory negligence—*Evidence for jury—Effect of finding by jury that plaintiff took "an undue risk"—Weight of evidence—Motion for judgment—Functions of Judge and Jury.* Plaintiff stepped off the footpath and started to cross the street in front of oncoming traffic. A motor milk van just missed hitting her, but a motor cyclist, coming up behind the milk van and seeing the road clear to the right of the van, in attempting to pass the milk van, hit the plaintiff who had emerged in front of the van. The Lord Chief Justice refused to direct for the defendant and the jury found that the defendant was guilty of negligence, that his negligence caused the accident, that the plaintiff was not guilty of negligence, but they believed she took an undue risk in relation to the motor van, and they assessed the damages at £745 3*s.* 0*d.* The Lord Chief Justice gave judgment for the plaintiff for that amount. The defendant appealed to the Court of Appeal on the ground that the findings of the jury that the defendant was guilty of negligence, that his negligence caused the accident, and that the plaintiff was not guilty of negligence, were made without evidence and against the weight of evidence; that there was no evidence proper to be submitted to the jury of negligence on the part of the defendant, and that the Lord Chief Justice should have granted the application for a direction made to him on behalf of the defendant and, alternatively, on the jury's finding that the plaintiff took an undue risk in relation to the motor van, the Lord Chief Justice should have entered judgment for the defendant. *Held*, by Andrews, L.J. (*a*) that there was evidence of negligence on the part of the defendant proper to be submitted to the jury and that the Lord Chief Justice was right in refusing to direct in the defendant's favour; (*b*) that even assuming contributory negligence to have been admitted or proved, there was ample evidence upon which the jury might reasonably have found that the defendant could have avoided the consequences of that negligence; (*c*) that the jury's answer that the plaintiff took an undue risk in relation to the motor van did not amount to a finding of contributory negligence; and that the defendant's motion should be dismissed. *Held*, by Best, L.J. (*a*) that there was no evidence proper to be submitted to the jury from which they ought to infer that the defendant was guilty of negligence, and that the Lord Chief Justice should have directed in his favour; (*b*) that the defendant was entitled to judgment on the ground that if the jury found, as they should have found, plaintiff guilty of negligence, they should also have found that the defendant could not by reasonable care have avoided the consequences of the plaintiff's negligence, and that judgment should be entered for the defendant. The Court of Appeal being equally divided, the judgment entered for the plaintiff by the Lord Chief Justice stood. *Finlay v. Price.* [C.A. 81

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PRACTICE — CONSOLIDATION — *Two actions for negligence arising out of same accident—Plea of contributory negligence in one action—Whether such actions should be tried together as one action.—R.S.C.*, 1905, *Order* 49, *r.* 9. Two actions for negligence arising out of a motor accident were brought against the defendant. The plaintiff in the first action claimed damages in respect of the death of her husband, who was driving a motor cycle combination with which the defendant's motor lorry collided. The plaintiff in the second action claimed damages for injuries which he sustained while travelling as a passenger in the sidecar of the deceased's machine on the same occasion. The defence in the first action contained a plea of contributory negligence on the part of the deceased, but there was no plea of contributory negligence in the second action. A motion brought by the defendant for an order that both actions should be tried together as one action was refused. *McLean v. Scott; Howarth v. Scott.* [K.B.D. 212.

PRACTICE — COSTS — TAXATION — *Lodgment of numerous notices of similar nature for transmission through the Notice Office—Such notices all lodged on same occasion—Charge for lodgment thereof—Discretion of Taxing Master—R.S.C.* 1905, *Order* 65, *rr.* 19, 21 *and* 65 *sub-r.* 38 ; *Appendix S., No.* 155. In the winding up of a company under order of the Court it became necessary to serve notices upon one hundred and seventeen contributories of the company. The notices, all of which were of a similar nature, were lodged for transmission through the Notice Office, at one and the same time. *Held,* that under Order 65, rule 21 of R.S.C. 1905, the solicitors for the Official Liquidator were entitled on taxation to be allowed the full lower scale fee specified in Appendix S., Part 1 (item No. 155) in respect of the lodgment of each notice, and that the Taxing Master had no discretion under Order 65, rule 65, sub-r. 38, to reduce this charge. *In the matter of the Foreglen Co-operative Agricultural Society, Ltd.* (*No.* 2).
[Ch. D. 223

PRACTICE—MOTION TO REMIT *action to County Court—Affidavit—Sufficiency of averment—Statement of defence—Common Law Procedure Act* (*Ireland*), 1870, (33 *&* 34 *Vict., c.* 109) *section* 5. The plaintiff had been surety for the defendant, and was sued in that capacity, and had to pay. He then brought an action against the defendant to recover from him the sum which he (the plaintiff) had been obliged to pay as surety. The defendant moved to remit the action to the County Court under section 5 of the Common Law Procedure Act, 1870, and stated in his affidavit that he had a good and valid defence to the action brought against him for he said that he did not owe the sum of £44 10*s.* 7*d.*, being the amount claimed by the plaintiff in the writ of summons, or any part thereof. *Held,* by Andews, L.J. (sitting as Vacation Judge) that the averment in the defendant's affidavit was defective in not setting out his grounds of defence or any particulars which would enable the Court to say if there was a *bona fide* contest as to plaintiff's claim, and that the motion must be refused. *McCrory v. McCrory.*
[K.B.D. 170

PRACTICE—PARTICULARS OF NEGLIGENCE. In an action brought under the Fatal Accidents Act, 1846, in respect of the alleged negligence of the defendant in the driving of a motor car, the particulars of negligence furnished by the plaintiff included the following paragraph :—" The plaintiff will rely also upon any other acts or omissions of the defendant constituting negligence or breach of duty as may be given in evidence or otherwise appear at the trial of this action." Upon a motion brought by the defendant for an order striking out this particular it was ordered that the following should be substituted :—" The plaintiff will also rely on such facts in proof of the negligence alleged in the statement of claim as are in the knowledge of the defendant but not of the plaintiff and appear in the evidence of the defendant and her witnesses at the hearing of the action." The order further provided that the plaintiff should have liberty to rely also upon such other particulars of negligence as the plaintiff might, not later than ten days before the commencement of the trial of the action, give notice of, in writing, to the defendant. *McWatters v. Maxwell.*
[K.B.D. 176

PRACTICE — WILL — *Construction—Trusts of will already administered—Costs—R.S.C.* 1905, *Order* 54A. *and Order* 55 *r.* 4. The testator had bequeathed his farm to his wife and daughter for their respective lives with remainder to his grandson, W.J.W., on condition that he should reside on the farm and assist in the management thereof until he attained the age of 20 years, with a gift over to testator's son, W.W., in the event of this condition not being fulfilled. In the year 1928, W.J.W. attained the age of 21 years, whereupon the surviving trustee of the will gave him possession of the farm, the wife and daughter having previously died. On the death of W.J.W. in the year 1930, W.W. brought a summons for the construction of the will. It was contended on his behalf that W.J.W. was not entitled to the farm, under the terms of the will, by reason of the fact that he had failed to comply with the conditions of the bequest. The plaintiff sought to have this matter decided by the Court either under Order 54A, or under Order 55, rule 4. *Held,* by the Court of Appeal (affirming the judgment of Wilson, J. [1931]

N.I. 138) that the trustee having administered the deceased's estate, and allowed W.J.W. into possession of the farm, the question in issue was not a proper one to be determined on originating summons under Order 55, rule 4, as a question arising in the administration of the trusts of the deceased's will. And *Held*, that Wilson, J., in refusing to determine the matter under Order 55A. (as a question arising upon the construction of the will) had exercised the discretion given to him by rule 4 of that Order, upon proper grounds, and that his judgment on that point should also be affirmed. *In re Samuel Wightman, deceased. Wightman v. Cousins and Skillen.* [C.A. 61

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PROBATE — PRACTICE—*Application for order requiring executor to bring in and lodge will—Necessity for, before motion for attachment—Court of Probate Act (Ireland)*, 1857 (20 & 21 *Vict.*, c. 79, *s.* 31)—*Court of Probate Act (Ireland)*, 1859 (22 & 23 *Vict.* c. 31, s. 19). The deceased by his will devised and bequeathed all his property to A. N. whom he appointed his sole executor. A. N. took no steps to prove the will and failed to comply with a citation, served upon him at the instance of a judgment creditor of the deceased, calling upon him to introduce and deposit the will and to accept or refuse probate thereof. The present application was made under section 31 of the Court of Probate Act (Ireland), 1857, for an order requiring A. N. to bring in and deposit the will. It was suggested that a subpœna should have been issued as provided by section 19 of the Court of Probate Act (Ireland), 1859, and an application then made to attach the executor in the event of his failing to produce the will. *Held*, that the proper procedure was under sec. 31 of the Court of Probate Act (Ireland), 1857. *In the Goods of Edward Nelson. In the Goods of John Healy* (1 N.I.J.R. 77) followed. [K.B.D. 174

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RESTRAINT OF TRADE—*Agreement by musicians not to enter into any engagement within certain areas after termination of their employment—Reasonableness of restriction.* The defendants entered into contracts of employment as members of the plaintiff's orchestra, one of the terms of which was that they should not, within three years from the termination of such employment, enter into any similar engagements within fifty miles of Great Yarmouth, Redcar, Southport, New Brighton, or Belfast, these being towns in which the defendants had previously played under the plaintiff's direction. While the defendants were playing as members of the plaintiff's orchestra in a restaurant in Belfast, the plaintiff terminated their employment and they thereupon entered into an engagement with the proprietor of the same restaurant to play there on their own account. Pending the hearing of the action the plaintiff moved for an interlocutory injunction to restrain the defendants from playing in the said restaurant in breach of the contracts aforesaid. *Held*, that the contracts were in undue restraint of trade and that the plaintiff was not entitled to an interim injunction. *Dossor v. Monaghan and Others.* [Ch. D. 209

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——1905 R.S.C. (Ir.) Or. 65, rr. 19, 21, 65 (38) 223
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SUMMARY JURISDICTION—Jurisdiction of County Court—*Right of County Council to sue for expenses, incurred by them under the Drainage Acts, as a debt in County Court—Right to sue in a summary manner expressly given by statute—Drainage Act (Northern Ireland)*, 1929 (20 *Geo.* 5, *c.* 20), *s.* 22. The plaintiffs sued the defendant in the County Court for the amount of expenses incurred in scouring out and cleansing a watercourse through the defendant's lands, and they determined that the amount of such expenses should be a debt due to them by the defendant. This amount sued for was claimed to be due under the provisions of section 22, sub-section 2, of the Drainage Act (Northern Ireland), 1929, which provides *inter alia* that the whole or any part of the expenses incurred by the county council in executing such works as are necessary for causing a watercourse on any agricultural lands to be scoured out and cleansed, shall, if they so determine, be a debt due to the county council by the person upon whom a notice has been served, requiring him to scour out and cleanse such watercourse, and be recoverable from him in a summary manner. The matter came before the County Court Judge by way of civil bill. The County Court Judge held that section 22 of the Drainage Act (Northern Ireland), 1929, created a new right in the County Council and prescribed the remedy for enforcing it, and that this was the only remedy open to the plaintiffs. He accordingly dismissed the civil bill. The plaintiffs appealed to the Judge of Assize who stated a case on the point for the opinion of the Court of Appeal. *Held*, by the Court of Appeal (Best, L.J. and Wilson, J., dissentiente Moore, L.C.J.) that the expenses claimed are expenses recoverable only under the statute, and the debt is not a debt due by common law, but is a statutory debt. It followed that this new statutory liability and debt could only be recoverable in a summary manner as provided by the statute which created it. *Fermanagh County Council* v. *Parker.* [C.A. 153

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WATERWORKS—Burst in line of pipes on county road—Flooding—Liability of local authority—*Absence of negligence—Parliamentary powers.* The defendants by a private Act were authorised to make and maintain a reservoir some distance outside the town of B. and to carry water therefrom down to and along the road to B., in a line of pipes, and to distribute this water for payment

in the town of B. The plaintiff owned and occupied a shop on this road to B. and about one and a half miles outside the town of B. On 10th March, 1931, the plaintiff discovered that his shop was surrounded, and his premises cut off from the county road by water, and it was ascertained that the water which caused the flooding came from a burst in the line of pipes on the county road near the plaintiff's shop. *Held*, by the Court of Appeal (Andrews and Best, L.JJ), that the defendants were not liable for the damage done to the plaintiff's property by the bursting of the main or water pipe on the county road in the absence of all proof of negligence on the part of the defendants, causing the damage complained of, other than the actual bursting of the pipe. *Burniston v. Corporation of Bangor.*
[C.A. 178.

WILL—CONSTRUCTION—LIMITATION IN DEFAULT *of appointment depending on prior limitation which fails for remoteness—Whether void.* The principle that a limitation depending or expectant upon a prior limitation, which is void for remoteness, is invalid, does not necessarily apply to limitations in default of appointment. The testator by his will devised a portion of his estate upon trust, after the death of his wife (which happened), to pay the rents and profits thereof in certain shares to five of his children, Francis, Joseph, Grace, Jane and Margaret during their respective lives, with powers of appointment and gifts over in default of appointment as therein mentioned. The testator directed that from and after the death of the survivor of his said five children, his trustees should hold the shares of any of them, which might remain unappointed by will, for his sons, James and William Thomas jointly for life, and after the death of the survivor, for the first son of Francis for life, and after his death, for such of his children, grandchildren, brothers, sisters, nephews and neices as he should by his last will appoint, and in default of appointment, for the second and every other son of the said Francis, severally, according to their respective seniorities with limitations and powers of appointment similar to those given to the first son of Francis. Then followed the words: "and in "default of the same then for the first "and every other son of the said "Joseph successively according to their "respective seniorities in like manner "and with like limitations and power "of appointment as is hereby given to "the first and other sons of Francis." Similar provisions were made in favour of the first and every other son of the testator's sons and daughters, James, William, Thomas, Grace, Jane and Margaret, all of which provisions were introduced by the words :—"and in default," while the ultimate limitation was expressed in the words :—"in default for my own right heirs for ever." The testator's last surviving son was William Thomas, who prior to his death, was entitled to a life interest in the shares of Francis and Margaret, both of whom died without issue and without having exercised the powers of appointment given to them by the will. The question for determination was as to who was entitled, on the death of William Thomas, to the shares of Francis and Margaret. The claimants were Edward Norman, the only son of the testator's son Joseph, and appointee under his will of all his (Joseph's) interest under the will of the testator, and Edward James, the only son of the testator's eldest son, James, who claimed to be entitled under an alleged intestacy. Both claimants were born during the lifetime of the testator. It was admitted that the gift over which immediately followed the life estate to the first son of the testator's son, Francis (or, as there was no such son, the gift which in the events which happened, immediately followed the life estate of William Thomas) offended against the rule against perpetuities and was void. It was argued on behalf of Edward Norman that he was entitled to a life estate under the immediately succeeding gift in favour of "the first and every other son of Joseph." On behalf of Edward James it was contended that, as the limitation in favour of the children of the first son was void, all ulterior limitations were also void. It was thus submitted that an intestacy arose upon the death of William Thomas, the last tenant for life, and that the interest in question thereupon passed to the heir-at-law of the testator, namely, his eldest son, James, who had by his will appointed all his estate and interest in the lands to his only son, the said Edward James. *Held*, that the gift over in default of appointment by Francis took effect independently of the preceding power and was consequently valid; and that Edward Norman was, accordingly, entitled to the interest which he claimed. *In re Hay, deceased, Leech v. Hay.* [Ch. D. 215

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WORKMEN'S COMPENSATION —EMPLOYER AND WORKMAN—*Employment—Accident arising out of and in the course of the employment*—SAILOR ASHORE *for his own business—Fall from quay—Drowned either by stepping off the quay thinking he was stepping on to the gangway, or in an attempt to get from the place where he reached the quay edge to the gangway—Workmen's Compensation Act (Northern Ireland)*, 1927, (17 *&* 18 *Geo.* 5, *c.* 16) *s.* 1, *sub-s.* 1. The chief engineer of a ship lying in harbour went ashore on leave on his own business. On returning to the ship in the evening, which was dark, he fell from the quay and was drowned. The Recorder found that he fell in either by stepping off the quay thinking that he was stepping on to the gangway, or in an attempt to get from the place where he reached the quay edge to the gangway, and Held, that the applicant was entitled to compensation. *Held*, by the Court of Appeal (Andrews and Best, L.JJ.), that there was ample evidence to support the finding of the Recorder that the accident arose out of and in the course of the employment and that the chief engineer's widow was entitled to compensation. *Todd v. MacCallum.* [C.A. 130

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